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CURRENT EVENTS.

LORD CHANCELLOR OF ENGLAND.—In the last number of thn *Solicitor's Journal*, of London, it is said that "there is a general feeling of regret, among lawyers, that the necessities of party government should so soon remove Lord Herschell from the Chancellorship." Then follows a very handsome and appreciative compliment to the ability and learning of the retiring judge. We fail to perceive, however, in this notice, nor have we elsewhere observed any expression of regret that the highest law officer of the Kingdom should hold his office at the mercy of the "necessities of party government," that he should go out of office with the party under whose auspices he came in.

The conservatism of the English people is nowhere more manifest than in the tenacity with which they cling to forms, laws, and customs, which have outlived their usefulness. There is no reason why the Lord Chancellor should be a political officer at all, or if there is, why the functions of the office should not be divided and vested in two officials, the political, who might well share the fate of his party, and the judicial, who should cease to be an anomaly, and hold his office like other judges by a life tenure.

This is a change rather to be desired than expected, for notwithstanding the many reforms of the nineteenth century, the *nolumus leges Angliæ mutare* is still too strong in the English heart to permit any change which has not been peremptorily demanded by urgent necessity or insistent public sentiment.

NATURALIZATION LAWS.—A contemporary suggests that it would be a wise measure to revise, amend, and strengthen our naturalization laws, in view of the disorderly conduct and destructive doctrines of the anarchists and socialists, who are chiefly men of foreign birth. We do not see that the process indicated would mend the matter at all, for the class of persons, proposed to be affected, scorn alike all political and social ties, and are equally dangerous, whether they are citizens or aliens. The naturalization laws are well enough, if they were properly enforced, but as long as the foreign vote is so largly a political factor, and aliens are naturalized in shoals upon the eve of every election, it is manifest that a proper enforcement of naturalization laws can hardly be expected. The law requires,[1] that it must appear to the satisfaction of the court that the applicant is "a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." All this has become mere form. No means are used to satisfy the court on these points, and no court is satisfied judicially, or personally, or in any other respect, that the average applicant, who comes before him, knows anything about the Constitution of the United States, or its principles. The truth is, the privileges of citizenship have been too much cheapened by these mere *pro forma* proceedings, and would be more highly valued by our adopted citizens if they were less easily come by.

THE CALIFORNIA JUDICIARY.—In a recent number of this Journal,[2] we called the attention of our readers to the extraordinary proceedings pending in the California Legislature against the Judges of the Supreme Court of that State. It now appears to have been discovered that two of the the obnoxious judges have, since their election, by means of disease become, now are and "for all time hereafter will be, totally incapacitated, by means of physical and mental infirmity, to discharge the duties of" the office. Such is the tenor and effect of a petition to the California Legislature, signed by David S. Terry, which was duly referred, in each House, to a committee.

The charge is sufficiently broad to cover the case, for it includes the past, present and future, and implies in the petitioner, prophetic powers of a very high order, for nobody but a prophet could speak so positively

[1] Rev. Stat. U. S. § 2165, sub. sec. 3.

[2] 23 Cent. L. J. 121.

for "all time hereafter." It is not a little remarkable, however, that the mental and physical incapacity of these judges, should now be brought to the front for the first time, as would seem to be the case. The Executive Committee of the State Irrigation Convention, while agitating actively for the removal of the judges, and admitting their uprightness, integrity and personal character, does not seem to have impugned their physical health or mental capacity; and the California Bar Asociation, while vigorously protesting against any change in the existing *status*, do not intimate that there have been made against the judges any charges of physical incapacitation or mental imbecility.

The whole affair is singularly discreditable to the State. The only substantial charge made against the judges seems to be that they decided the case, of Lux v. Haggin, according to the law, as they understood the law. All the other charges made against them, and the alleged imperfection of the judiciary system of the State, are manifestly afterthoughts which, but for the case of Lux v. Haggin, would probably have never been heard of. And the question arises: have the victors in Lux v. Haggin no rights which anybody is bound to respect? And if that case is to be regarded as *res judicata*, are other people, who hold the same rights, under like circumstances, to be deprived of those rights by the judgment of a court to be organized expressly and avowedly to decide against them? And if so, is such proceeding due process of law?

NOTES OF RECENT DECISIONS.

ABSOLUTE AND QUALIFIED PROPERTY—LESSOR AND LESSEE—FERÆ NATURÆ—NATURAL GAS.—The Supreme Court of West Virginia, in a recent case,[1] adjudicated a question relating to the legal status of a very peculiar style of property. The facts were, that the plaintiffs held the fee of certain lands in the oil regions of West Virginia. The defendants held, under the plaintiffs' grantor, a lease for fifteen years of the land in question, for the purpose (and for that only) of boring for oil and extracting it from the earth, being bound to pay a royalty in kind for the privilege. The defendants in due time "struck oil," but the well was quite indifferent and the supply of oil scanty, and required pumping to bring it to the surface. A strong stream of natural gas, however, issued from the well, and this the lessees secured and utilized as fuel. The lessors regarded this gas as their property, demanded payment for the quantity used by the lessees, and filed a bill for an account and for payment. Their demand was sustained by the court below, but upon appeal, the Supreme Court reversed its decree and *held* that natural, or hydrocarbon gas, which issues by its own force from the earth, is not absolute property, but the subject of only qualified property.

There is, however, this qualification: if the gas did not, of its own force, issue from the well, the lessee could not, without the consent of the lessor, pump it from the well. It is not explained by the court, and it is a little hard to see, why the lessee should be permitted to catch and cage the fugitive æriform fluid, above the surface of the earth, and not below it, for the title of the lessor is the same to the space above the surface as to the bottom of the well. *Cujus est solum, ejus est usque ad cœlum.*

The court puts its ruling upon the ground that the gas in question is in the nature of air and water, and of animals *ferœ naturæ;* and therefore that the lessee is no more bound to pay for the gas that he burns, than for the air he breathes, the water he drinks, or the deer that he shoots upon the leased premises.

The court assumes, upon scientific authorities, that the supply of gas from wells of this description is inexhaustible, and infers that it "cannot be the subject of compensation for appropriation and waste, where the access is rightful." We do not see that the quantity of the gas which issues from the well is material. If the owner of the land has no title to the inexhaustable stream, why should he have a title to that which flows only for a hundred days. If the gas is *ferœ naturæ*, the lessor can have no more property in it, whether there is little or much, than he can have in the wolf or the deer. *They* are cer-

[1] Wood etc. Co. v. West Virginia etc. Co., S. C. W. Va., June 27, 1886; 34 Pitts. Leg. Jour. 7.

certainly exhaustible. The rule is stated by the court to be that, in a case in which a trespass is committed upon anything in which the owner has only a qualified property, as air, water, &c., no damage can be recovered, for the trespass is *damnum absque injuria*. And the same rule applies when no trespass is committed, and the lawful action of one party deprives another of his whole supply of such qualified property, as where one man digging a well on his own land drains the well of his neighbor.[2]

BILL TO QUIET TITLE—EXECUTION SALE OF LAND—SHERIFF'S RETURN—AMENDMENT OF—NOTICE—BOUNDARIES—EVIDENCE.—In recent case,[3] the Supreme Court of Kansas has adjudicated several interesting points connected with the sale of real estate upon execution. The facts were, that Miss Hathaway had a judgment against the Blue Rapids Town Company, upon which execution was issued and levied by the sheriff upon a certain town lot, which was exposed to sale, after appraisement, and struck off to W. H. H. Freeman, who however refused to pay the amount of his bid. The sheriff returned the execution unsatisfied. At the next term of the court the execution plaintiff showed that Freeman's bid was for her, and the sheriff was required to amend his return, she paid the difference and received a sheriff's deed for the land. Of all this, the execution defendant had no previous notice, and subsequently sold its interest in the property to the grantors of the present defendant. This suit was brought by the grantees of Miss Hathaway, to quiet title, against the defendant claiming by mesne conveyances under the Blue Rapids Town Company.

The court held that the sheriff's amendment of his return, although he resisted the application, and made it under the order of the court, was regular and obligatory on all concerned; that the proceeding was one between the officer and the court, is *ex parte* in its very nature, and that no one has an absolute right to notice of it; that the amended return, being made under the same sanction and responsibility as the original, becomes the return in the case, and cannot be questioned collaterally by the parties to the action or their privies.[4]

There are cases, however, in which notice to amend a sheriff's return must be given, as when a long time has passed after the return was made, or where the case has been stricken from the docket, or where a return has been made upon an execution which shows that it has been satisfied, and the amendment would restore the liability of the defendant.[5] Unless some such circumstances exist, no notice is necessary. The court says: "The parties are deemed to be in court until the sale is confirmed." But in this case, it may be observed, the original return of the sheriff showed no sale to confirm. On the contrary, after stating Freeman's bid and his failure to pay, the sheriff returns the lot "not sold for want of good and sufficient bids." We think that just here there is a "missing link" in the chain of the court's reasoning. As, however, the defendants did not buy upon the faith of the original return, they were not entitled to notice, especially as it appeared by the process, that the lot had been levied on, was in *custodia legis* and was not sold only for want of bidders. They were put upon inquiry by the very terms of the original return, and that of itself was equivalent to notice. And, of course, if the defendants came into the matter by purchase after the amendment had been made, *a fortiori*, they were not entitled to notice.[6]

The judgment of the court, however, might be rested on a still broader ground; that if a judgment and execution are undoubtedly valid, the sheriff's deed, based thereon, cannot be attacked collaterally by anyone, nor the proceedings impeached by strangers.[7]

Brown v. Illins, 25 Conn. 594; s. c., 27 Conn, 94; Emporia v. Sodan, 25 Kan. 608.

[3] Stetson v. Freeman, S. C. Kan., July 9, 1886; 11 c . Rep. 431.

[4] Rickards v. Ladd' 6 Sawy. 40; Morris v. Trustees, 15 Ill. 269; Dunn v. Rogers, 43 Ill. 260; Wright's Appeal, 25 Penn. St. 373; Kitchen v. Remsky, 42 Mo. 427.

[5] Coopwood v. Morgan, 34 Miss. 368; Thatcher v. Miller, 13 Mass. 271; Hovey v. Wait, 17 Pick. 197; O'Connor v. Wilson, 57 Ill. 226; Williams v. Doe, 9 Miss. 559.

[6] Baker v. Binninger, 14 N. Y. 270.

[7] Freeman on Executions, §§ 334, 339, 364, 365; Rorer on Judicial Sales, §§ 479, 480, 789, 1059: Rounsaville v Hazen, 33 Kan. 344; s. c., 6 Pac. R. 630; Cross v. Knox, 32 Kan. 725; s. c., 5 Pac. R. 32; Pritchard v. Madren, 31 Kan. 38; s. c., 2 Pac. R. 691.

Another question of some interest was considered and decided by the court: *i. e.*, whether, in the absence of evidence of a higher grade, it is competent to admit testimony of hearsay and reputation to establish boundaries and identity of land conveyed by a sheriff's deed. The lot in question was laid off, with many others, on a recorded plat as No. 11. There were no monuments to mark its precise situation, and the court below admitted parol testimony of old residents to show where lot No. 11 was always reputed to be. And, for want of better or higher evidence, the Supreme Court held that this kind of evidence was admissible.[8]

WILL—REVOCATION—MARRIAGE AND THE BIRTH OF A CHILD.—The Court of Appeals of Maryland have recently considered the question whether marriage and the birth of a child will operate as a revocation of a will.[9] The testator, James Spriggs, made his will in the life-time of his first wife, giving his whole estate to her and to her children. After her death he contracted a second marriage, of which several children were the issue. Upon his death the will was offered for probate and rejected on the ground that the second marriage, and the birth of a second set of children, operated a revocation of the will. The appellate court sustained the decision of the trial court.

There is no statute on the subject in Maryland, and the ruling is based wholly upon common law authorities. The rule of the common law is, that marriage and the birth of a child, after the execution of a will, revokes it, because it effects a total change in the situation of the testator's family.[10] The *rationale* of the rule, however, does not seem to have been very easily or clearly settled by the authorities. Lord Mansfield thought,[11] that it rested upon the presumption that the testator intended to revoke his will, and that it therefore followed that the presumption might be rebutted by parol evidence, "by every kind of evidence." Lord Kenyon, however, in a later case,[12] held that the rule was founded upon a different principle; that a tacit condition was annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family. This view was also taken by Lord Ellenborough,[13] and at a much later date re-affirmed in Marston v. Fox.[14] And that rule, so expressed, seems to control the whole subject. The fact that the testator afterwards acquires property has no bearing upon the question, for if the revocation depends upon the total change in the situation of the testator's family, that change takes place when the first child of the marriage is born, *eo instanti* the will is revoked and nothing occurring subsequently can reinstate it.

[8] Boardman v. Reed, 6 Pet. (U. S.) 328; Kenney v. Farnsworth, 17 Conn. 355; Harriman v. Brown, 8 Leigh, 697: Ralston v. Miller, 3 Rand. 44; Cox v. State, 41 Tex. 1; Conn. v. Penn., 1 Pet. C. C. 496.

[9] Baldwin v. Spriggs, Ct. App. Md., June 22, 1886; 5 Atl. Rep. 295.

[10] Brush v. Wilkins, 4 Johns. Ch. 506; Christopher v. Christopher, (1771) 2 Dickins, 445; Spraage v. Stone, (1773) Ambler, 721; see also the later case of Marston v. Fox, (1838) 8 Add. & E. 14.

[11] Brady v. Corbitt, 1778) 1 Doug. 31.

[12] Doe v. Lancashire, (1792) 5 Durn. & E. 49.

[13] Kenebel v. Scrafton, (1802) 2 East. 530.

[14] *Supra.*

PERSONAL LIABILITIES OF BANK OFFICERS.

GENERAL OBSERVATIONS.

In general terms bank officers undertake for good faith and honesty, and ordinary diligence and pru dence,[1] and are liable for the consequences of their fraud, misconduct, or gross negligence in the discharge of the business of their offices.[2] They are usually not liable for anything less than gross negligence,[3] and are never liable for an error of judgment, unless the act is so grossly wrong as

[1] United Society of Shakers v. Underwood, 9 Bush. 609; Graves v. Lebanon Nat. Bank, 10 Bush. 23; German Savings Bank v. Wulfekuhler, 19 Kan. 60; Paine v. Irwin, 59 How. Pr. 316; Williams v. McDonald, 37 N. J. Eq. 409; Bank v. St. John, 25 Ala. (N. S.) 566; Brannon v. Loring, S. C. Ky. 20 Cent. L. J. 57; Hauser v. Tate, 85 N. C. 81; State Bank v. Locke, 4 Dev. L. 529.

[2] Chester v. Halliard, 34 N. J. Eq. 341; Brinkerhoff v. Bostwick, 88 N. Y. 52.

[3] Brannon v. Loving, S. C. Ky. 20 Cent. L. J. 57; Mutual Building Fund & C. Sav. Bank v. Bossieux, 4 Hughes C. Ct. 387: Ackermann v. Halsey, 37 N. J. Eq. 356; Spering's Appeal, 71 Pa. St. 11; Gobold v. Mobile Bank, 11 Ala. 191.

to warrant the imputation of fraud or a want of the knowledge necessary for the performance of the duty assumed.[4]

These latter are the rules where the officer keeps within his authority and does not violate any law of the corporation, and where he is known to be such officer, and acts and contracts as such, without misrepresentation as to his power or other material matter. But bank officers are but agents of the corporation, and if they transcend or abuse their powers, or violate any law of the corporation, they are responsible to their principal,[5] and are personally liable on contracts made beyond such limits, as are agents of an individual.[6]

So, too, where the officer does not make it known that he is such officer, and contracts personally;[7] or where he misrepresents the authority he possesses, and thereby secures a contract between the corporation and another party, which for any reason cannot be enforced against it, the other party not knowing of such want of power, he becomes liable on the contract.[8] And it does not matter that he misrepresents his power in good faith.[9] But an officer will not incur this liability if the other party knew, or had equal means with the officer of knowing, that the act was beyond his powers; and, as observed in a former article, he is bound to take notice of such powers as are given or limited by statute, or the fundamental law of the corporation,[10] and, according to some authorities, by the by-laws themselves.[11]

LIABILITIES OF THE DIRECTORS.

Generally.—The liabilities of directors form no exception to the general rules above stated. It is their duty to use at any rate ordinary diligence in conducting and in acquiring knowledge of the business of the bank. Failing in this, they become liable for the consequences, as well as for their fraudulent practices, and cannot be heard to say that they were not apprised of facts, the existence of which is shown by the books, accounts, and correspondence of the bank, or which, with the exercise of such diligence, might otherwise have been known.[12]

Thus, where by their gross negligence or misconduct, they allow the funds of the bank to be lost or wasted, they are liable for the damages in an action by the bank,[13] or its receiver,[14] or in case the bank or receiver refuses to sue, or the receiver is a director, by a stockholder who has been compelled to contribute to the payment of the loss,[15] or a depositor who has suffered thereby.[16]

Must Have Accepted Office.—But to incur this liability, the office of director must, in general terms, have been accepted, or something must have been done or said by the person sought to be charged, that would reasonably lead to the belief that he was a director.[17] But the fact that the owners of a bank published, for more than four years, an advertisement containing the names of certain persons as directors, was held, in a Tennessee case, not to render them liable as such.[18] The persons elected directors need not, however, have acted.[19]

For Acts of Others—Good Faith and Ordinary Care and Prudence.—Where the liability of the directors for a breach of duty is joint, the innocence or dissent of one will not shield him;[20] but directors of an institu-

[4] Gobold v. Bank at Mobile, 11 Ala. 191.

[5] Dustin v. Daniels, 4 Den. 299; First Nat. Bank of Sturgis v. Reed, 36 Mich. 263. And see Franklin Ins. Co. v. Jenkins, 3 Wend. 130.

[6] First Nat. Bank v. Bennett, 33 Mich. 520.

[7] Story on Agency, §§ 266, 147; Field on Corporations, § 210.

[8] Field on Corporations, § 215.

[9] Story on Agency, §§ 56, 264; Paly on Agency, by Lloyd, 201; Field on Corporations, 231; Walker v. Bank of New York, 9 N. Y. 582; Hauser v. Tate, 85 N. C. 81.

[10] Bank of Augusta v. Earle, 13 Pet. 587.

[11] Wild v. Bank of Passamaquoddy, 3 Mason, 505; State v. Commercial Bank, 6 S. & M. 218; North River Bank v. Aymor, 3 Hill, 262; Mechanics' Bank v. N. Y., etc., R. Co. 13 N. Y. 599. And see Field on Corporations, §§ 218, 219.

[12] United Society of Shakers v. Underwood, 9 Bush. 609; Graves v. Lebanon Nat. Bank, 10 Bush. 23; German Sav. Bank v. Wulfekuhler, 19 Kan. 60; Paine v. Irwin, 59 How. Pr. 316; Williams v. McDonald, 37 N. J. Eq. 409; Bank v. St. John, 25 Ala. (N. S.) 566.

[13] Chester v. Halliard, 34 N. J. Eq. 341.

[14] Brinkerhoff v. Bostwick, 88 N. Y. 52; Mutual Building Fund, etc., Sav. Bank v. Bossieux, 4 Hughes C. Ct. 387; Van Dyck v. McQuade, 45 N. Y. Super. Ct. 620.

[15] Brinkerhoff v. Bostwick, *supra;* Nelson v. Burrows, 9 Abb. N. Cas. 280; Ackerman v. Halsey, 37 N. J. Eq. 356; 2 Atlantic Rep. 83; *contra*, Conway v. Halsey, 44 N. J. L. 462.

[16] Chester v. Halliard, 34 N. J. Eq. 356; 2 Atlantic Rep. 83; Maisch v. Savings Fund, 5 Phila. 30.

[17] Hume v. Commercial Bank, 9 Lea. 728.

[18] Hume v. Commercial Bank, *supra.*

[19] Ridenour v. Mayo, 40 O. S. 9.

[20] Bank v. Darden, 18 Ga. 318.

tion, guiltless of fraud or misconduct themselves, and innocent successors of those guilty of fraud or misconduct, are not bound by the acts or conduct of their predecessors.[21] Nor are they liable for losses sustained by the bank by the dishonesty or carelessness of the cashier, or other persons employed by them,[22] or for loss resulting from investments by them made,[23] if they have acted in good faith and with ordinary care and prudence.[24]

Nor, again, are those not members of the investment committee, to whose hands the business of loaning has been committed, liable, in the absence of cognizance or complicity, for irregular or unsafe investments.[25]

For Exercise of Discretionary Powers.—The directors are not liable for the exercise of discretionary powers intrusted to them, nor for their non-exercise, although loss thereby results to the bank. Thus, where they may in their discretion require a bond from the president, and they see fit not to do so, and loss is sustained as the result, they cannot be held therefor.[26]

For Illegal Issuance of Bank Bills.—Regarding the illegal issuance of bank bills, it has been held that the directors are liable to the holders, if the bank becomes insolvent, for the issuance of bank bills contrary to their charter; as where they issue before the prescribed amount of capital is subscribed and paid in.[27]

But by the expiration of the charter, it has also been held, the personal liability of directors for over issues is extinguished.[28]

They are not, however, released from liability by an assignment to which the creditors are not parties, nor consenting.[29]

For Depreciation in Bank's Bills.—The directors are not liable to a holder of the bills of the bank for depreciation therein, not even where it is caused by their misconduct.[30]

For Excess of Debts Over Limit.—Sometimes it is provided by statute that the debts of the bank shall not exceed a certain limit, and that in case of excess, the directors shall be liable for the same. Where such is the provision, and the limit has been exceeded, it will not avail a single director to show that he was absent, or that he dissented. Such a provision is remedial, not penal, and the liability is joint, not several.[31] Nor will it exempt the directory to show a judgment of forfeiture, or the expiration of the charter by its own limitation.[32]

Certificates of deposit are debts within the meaning of a statute providing that the debts shall not exceed a prescribed amount, "whether by bond, bill, note or other security."[33]

In Case of Insolvency.—Sometimes, too, it is provided that the directors shall be liable for the bank's debts in case of insolvency. But, in a Michigan case, it was held that where the statute authorizing the forming of the bank is unconstitutional, the directors cannot be made to respond under such a provision, the bank being illegal.[34]

In Missouri the point was made, that where the bank operates under a special charter, such an act impairs the contract between it and the State, and is therefore unconstitutional; but the court refused to sustain this view, saying that no charter can exempt a bank or its officers from regulations properly made in the exercise of the police power of the State.[35]

These provisions are not, however, self-enforcing, but require to be enforced by the ordinary remedies.[36]

Again, it is sometimes provided by statute that an officer of a bank receiving a deposit with knowledge of its insolvent condition shall be personally liable therefor. In an action under such a statute, it is only neces-

[21] Schley v. Dixon, 24 Ga. 273.
[22] Dunn v. Kyle, 14 Bush. 134; Brannon v. Loving, S. C. Ky. Dig. 20 Cent. L. J. 57. But see Paine v. Irwin, 59 How. Pr. 316.
[23] Williams v. McDonald, 37 N. J. Eq. 409.
[24] Spering's Appeal, 71 Pa. St. 11; Gobold v. Mobile Bank, 11 Ala. 191; Bank v. St. John, 25 Ala. (N. S.) 566.
[25] Williams v. Halliard, 38 N. J. Eq. 553.
[26] Williams v. Halliard, 38 N. J. Eq. 373.
[27] Schley v. Dixon, 24 Ga. 273.
[28] Moultrie v. Hoge, 21 Ga. 513. But compare Hargroves v. Chambers, 30 Ga. 580.
[29] Schley v. Dixon, 24 Ga. 273.
[30] Branch v. Roberts, 50 Barb. 435.
[31] Banks v. Darden, 18 Ga. 318. But see Sturges Burton, 8 O. S. 215.
[32] Hargroves v. Chambers, 30 Ga. 580. But compare Moultrie v. Hoge, 21 Ga, 513.
[33] Hargroves v. Chambers, 30 Ga. 580.
[34] Brooks v. Hill, 1 Mich. 118.
[35] Cummings v. Spaunhorst, 5 Mo. App. 21.
[36] Fusz v. Spaunhorst, 67 Mo. 256.

sary to show that the bank was insolvent. The burden of proof of the want of knowledge of the insolvency is on the officer sued.[37]

For False Statement in Articles of Association and Former Violations of Law.—The directors are not liable to one who becomes a stockholder, for false statements in the articles of association respecting the amount of capital actually subscribed and paid in, by which he was induced to become a stockholder.[38]

Nor can one who purchases stock in a banking association, maintain an action against a director therein, for a violation of law which occurred before he became a stockholder, although the value of the stock is depreciated thereby.[39]

For Payment of Unearned Dividend Declared.—The trustees of a savings bank are jointly and severally liable for a payment of dividends, not earned, under a resolution declaring dividends, and passed either with their concurrence or subsequent approval.[40]

For Fraudulent Sale to Bank and Unauthorized Purchase of Its Own Stock.—The directors are liable to the bank for loss occasioned by the fraudulent sale to it of its own stock.[41] But they are not liable to one from whom, in the name of the bank, they make an unauthorized purchase of its stock, which the bank repudiates.[42]

For Allowance of Extra Services.—The allowance by the directors to themselves, or one or more of their number, of more than the ordinary or stipulated compensation, is usually to be regarded with something of suspicion, and where it is not done in good faith, it certainly cannot be upheld; but, in Goldbold v. Bank at Mobile,[43] it was held that the giving of compensation to one of the directors, for extra services as an agent of the bank, though it may be unlawful, is not such an act as will expose the directory to liability, if done in good faith, and with the honest intent of benefitting the bank.

May Plead Statute of Limitations.—Directors sought to be made personally liable, may plead the statute of limitations.[44]

LIABILITIES OF THE PRESIDENT.

The president is usually the officer principally charged with the supervision and proper conduct of the executive business of the bank; and hence it is sometimes said that of him a higher degree of diligence is required than of a director, or, perhaps, of any other officer;[45] but this is not the requirement of the courts, according to the generally accepted rule. This holds him, with the others, as previously observed, to the exercise of only ordinary or reasonable care in the discharge of his duties, or such as men of ordinary prudence usually exercise in their own affairs of like character.[46]

On Warranty of Legality of Bank.—The president, however, in a sense, warrants the legal organization and existence of the bank; for an ostensible president of a spurious bank is liable for debts contracted by his assistance, and he must respond in damages to the same extent that the bank, if legally constituted, would have been liable. Nor can this liability be escaped by showing that he supposed himself the president of a legally constituted bank, if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation.[47]

For Allowing Indebtness to Exceed Limit.—Where the charter provides that the bank shall not at any time be indebted in excess of a certain amount, as that of its paid-up capital, the president is personally liable for the amount of a bill which he indorses when the bank is indebted in excess of that amount.[48]

For Overdrafts.—So he is liable for overdrafts which he has directed or allowed.[49]

For Permitting Securities to be Taken Away.—And it has been held that he is liable for a loss caused by his permitting a customer to take securities of the bank away for inspec-

[37] Dodge v. Mastin, 17 Fed. Rep. 660.
[38] Mabey v. Adams, 3 Bosw. 346.
[39] Maybey v. Adams, 3 Bosw. 346.
[40] Van Dyck v. McQuade, 45 N. Y. Super. Ct. 620.
[41] Shultz v. Christman, 6 Mo. App. 338.
[42] Abeles v. Cochran, 22 Kan. 405.
[43] 11 Ala. 191.
[44] Williams v. Halliard, 38 N. J. Eq. 373.
[45] Brannin v. Loving, S. C. Ky. Dig. 20 Cent. L. J. 57.
[46] Dunn v. Kyle, 14 Bush. 134; Hauser v. Tate, 85 N. C. 81.
[47] Hauser v. Tate, *supra*. But consult Brooker v. Hill, 1 Mich. 118.
[48] Brannin v. Loving, S. C. Ky. 20 Cent. L. J. 57.
[49] Oakland Savings Bank v. Wilcox, 60 Cal. 126.

tion; and that evidence is inadmissible to show that such was the usual custom among banks.[50]

Court will not Interfere by Injunction.—But notwithstanding an alleged malfeasance in office, a court of equity will not, according to one authority, grant an injunction restraining the president or cashier in the exercise of his official duties.[51]

Court cannot Declare Officer Trustee, When.—Nor can a court where an officer of a bank fraudulently abstracts the funds, and invests them in his own name, declare him a trustee and indemnify the bank out of the invest, ment.[52]

LIABILITIES OF THE CASHIER.

Generally.—The liabilities of the cashier of a bank are not different, in any respect, from those stated at the beginning of this article. He is bound for ordinary diligence and honesty, and is liable for the results of the want of either.[53] Nor is it a defense in an action brought by the bank for his wrongful appropriation of moneys, that, at the time of such appropriation, he was the owner of the greater part of the stock of the bank, and has since that time sold it to other parties who are now the officers and managing authorities.[54]

For Application of the Notes of the Bank to his own Use.—As an example of his liability, if he applies the notes of the bank to his own use, he must respond therefor, and to the full nominal amount. He cannot avail himself of their depreciation.[55]

But a statute affixing a penalty for the conversion by a cashier of any "money, bank bill, or note," does not extend to promissory notes (other than bank notes,) or to other commercial paper.[56]

For Allowing Overdrafts.—A cashier may be held liable for negligently or dishonestly allowing overdrafts by which the bank suffers, but he is not liable for permitting it where the transaction is in reality a loan upon sufficient security.[57]

For Funds paid to Bank Without Authority.—If he receives money from an officer of another bank, knowing that that other has no authority to make such payment, he is personally liable for it, and this, though he has paid it over to his principal.[58]

For Misrepresentation as to Amount of Deposit.—A cashier is not liable for erroneous information given in good faith to a party respecting the amount of money deposited to his credit by a third person, which mistake causes him loss.[59]

For not Consulting Other officers.—Nor, where the duty is imposed on him of carrying on the bank's business, can be held responsible for a neglect of duty in not consulting other officers of the bank, or committees, whom, by the by-laws, he is required to consult in making discounts, where such committees hold no meetings, and the officers systematically absent themselves from the performance of their duties.[60]

LIABILITIES OF CASHIER AND SURETIES ON HIS BOND.

Generally.—Well and Truly to Perform.—A cashier's bond is commonly "well and truly" to perform the duties of the office. Such a bond includes not only honesty, but reasonable skill and diligence. If therefore he performs those duties negligently or unskillfully, or if he violates them from a want of capacity and care, the condition of his bond is broken, and his sureties are liable for his misdoings.[61] It extends also to all defaults in the duties annexed to such office, from time to time, by those who are authorized to control the affairs of the bank;[62] for the sureties enter into the contract with reference to the rights and authority of the president and directors under the charter and by-laws.

And it is no defense to show, in an action on such a bond, wherein it is alleged that the cashier has received money for which he has not accounted, that he had the character of

[50] Citizen's Bank v. Wiegand, 12 Phila. 496.
[51] Bayless v. Orne, 1 Freem. Ch. 161. And see Ogden v. Kip, 6 Johns. Ch. 160.
[52] Pascoag Bank, v. Hunt, 3 Edw. 583.
[53] State Bank v. Locke, 4 Dev. L. 529.
[54] Fort Scott Bank v. Drake, 29 Kan. 311.
[55] Pendleton v. Bank of Kentucky, 1 T. B. Mon. 177. But see Barrington v. Bank of Washington, 14 Serg. & R. 405, as the measure of damages.
[56] State v. Stimson, 24 N. J. L. 9.
[57] Commercial Bank v. Ten Eyck, 48 N. Y. 305.
[58] American Bank v. Wheelock, 45 N. Y. Super. Ct. 205.
[59] Herrin v. Franklin Co. Bank, 32 Vt. 274.
[60] Oswego Bank v. Burt, 93 N. Y. 233.
[61] Minor v. Mechanics' Bank, 1 Pet. 46; State Bank v. Chetwood, 8 N. J. L. 25; Barrington v. Bank of Washington, 14 Serg. & R. 405; American Bank v. Adams, 12 Pick. 303; Bank of Washington v. Barrington, 2 Pa. 27; Batchelor v. Planters' Bank, 78 Ky. 435; *contra*, Union Bank v. Clossey, 10 Johns. 271.
[62] Minor v. Mechanics' Bank, *supra*.

an honest, careful, and vigilant officer, and that similar losses by bank officers are frequent, and that the directors have expressed their belief that the loss in question was caused by accidental overpayments, and that they continued to employ him after the loss.[63] Nor is any act or vote of the directors, contrary to their duties, and in fraud of the stockholders' rights and interests, an excuse or defense.[64] Thus the fact that the directors know of overdrafts allowed by the cashier, will not release the sureties from liability for losses caused by such overdrafts.[65]

However it has been decided, that, where the law requires the removal of a cashier for ascertained delinquency, and the managers of the bank retain him in service after knowing such cause of removal, and connive at his misconduct, his sureties are not liable for any breach of his bond, subsequent to the discovery of his misdoings.[66]

Bond Should be Approved.—To render it binding, the bond shoud be approved; but it may be shown to have been approved by the directors (according to the rules prescribed in the charter of the bank), by presumptive evidence; a record, or other written evidence of such approval, not being necessary.[67] Indeed it is held that if a cashier be duly appointed, and permitted to act in his office for a long time, under the directors' sanction, his bond need not be accepted according to the terms of the charter, in order to render his sureties liable for his breach of duty.[68]

In Case of Misnomer.—And although a surety is entitled to have his undertaking strictly construed, a misnomer of the corporation in the bond, by the omission of the words "and company," does not vitiate it.[69]

Where Deposit Received away from Bank.—A cashier who receives money for deposit out of the bank, and not in banking hours, or receives its funds at places distant from the bank, and does not account for them, is liable on his bond.[70]

For Changing Securities.—So where he exceeds his power by changing the securities of the bank, without the knowledge of the directors, he thereby makes himself and his sureties liable.[71]

In Case of Robbery, Failure of the Bank, etc.—But, on the other hand from the above, the obligors are not responsible for money of which the cashier is robbed in the discharge of his duty,[72] nor, on failure of the bank, for funds deposited in accordance with the by-laws.[73] Nor again can sureties be held, who become such on the faith of a statement by the directors of the condition of the bank which turns out to be false.[74]

Notice not Necessary.—It is not necessary, in order to charge a cashier's sureties, to give them notice, where damages are caused by his default.[75]

Period of Liability.—As to the time up to which the sureties on the cashier's bond are liable, it may be said that it is up to the time of his actual discharge,[76] or the expiration of the charter, or term of the bond. Beyond this they are not liable.[77] And in Grocer's Bank v. Kingman,[78] it was held that where the sureties undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his fraud or negligence in the performance of his duties, they are, by an increase of the capital stock of the bank after the making of the bond, exonerated from liability for his acts after the additional capital has been put in.

So, no action can be maintained against the

[63] American Bank v. Adams, 12 Pick. 303; State Bank v. Chetwood, 8 N. J. L. 28. And see Mussey v. Eagle Bank, 9 Metc. 306; Citizens' Bank v. Wiegand, 12 Phila. 496.

[64] Minor v. Mechanics' Bank, 1 Pet. 46; Bank of Washington v. Barrington, 2 Pa. 27. But see Dedham Bank v. Chickering, 4 Pick. 314.

[65] Market Street Bank v. Stumpe, 2 Mo. App. 545.

[66] Taylor v. Bank of Kentucky, 2 J. J. Marsh. 568.

[67] Bank of United States v. Daudridge, 12 Wheat. 64; Union Bank v. Ridgely, 1 Har. & G. 413, 429. And see Dedham Bank v. Chickering, 3 Pick. 335.

[68] Bank of United States v. Daudridge, *supra*.

[69] Pendleton v. Bank of Kentucky, 1 T. B. Mon. 175.

[70] Pendleton v. Bank of Kentucky, *supra*.

[71] Barrington v. Bank of Washington, 14 Serg. & R. 405.

[72] Huntsville Bank v. Hill, 1 Stew. 201.

[73] 26 N. W. Rep. 282.

[74] Graves v. Lebanon Nat. Bank, 10 Bush. 23.

[75] State Bank v. Chetwood, 8 N. J. L. 1.

[76] McGill v. Bank of United States, 12 Wheat. 511. And see Exeter Bank v. Rogers, 7 N. H. 21.

[77] Thompson v. Young, 2 O. 334. And see Bank of Washington v. Barrington, 2 Pa. 27. But consult Union Bank of Georgetown v. Forrest, 3 Cranch C. Ct. 218.

[78] 82 Mass. 473.

sureties for something occuring after a reappointment, and after the giving and acceptance of a new bond.[79] L. K. MIHILLS.

Akron, O.

[79] Frankfort Bank v. Johnson, 23 Me. 322. But see Amherst Bank v. Root, 2 Metc. 522.

TRUST — TRUSTEE — PURCHASE BY, OF TRUST PROPERTY — WHEN VOIDABLE — ELECTION OF BENEFICIARY.

SCHOLLE v. SCHOLLE.

New York Court of Appeals, Jan. 19, 1886.

TRUSTEE—*Purchasing Trust Property.* — The general rule is that the purchase by a trustee, directly or indirectly, of any part of a trnst estate which he is empowered to sell as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has, or has not a personal interest in the same property.

But where a trustee has an interest to protect by bidding at a sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title.

Appeal from order of general term of the Superior court of the city of New York, affirming an order of the special term requiring the appellant to complete the purchase of the lots made by him at the sale in this action. The facts appear in the opinion.

Alex. B. Johnson, for appellant; *Ferdinand R. Minrax*, for respondents.

EARL, J., delivered the opinion of the court.

Prior to March 15, 1880, Abraham Scholle, together with the plaintiff, William Scholle, and the defendant, Jacob Scholle, were seized of certain real estate in the city of New York, as equal tenants in common. Abraham Scholle died in March, 1880, leaving a will whereby he appointed his brothers, Jacob and William Scholle, his widow, Barbetta, Julius Ephrmann, and Simon Davidson, executors and trustees, all of whom but William Scholle qualified as such. Davidson was subsequently discharged by order of the surrogate's court and the other three acted as sole trustees and executors of the will. The will was also admitted to probate in California, and there William Scholle qualified as executor. By the provisions of the will, the testator gave his executors power to sell his real estate and he directed them to sell the same and invest the proceeds as directed, and pay the income thereof to his children, during their lives, and at their deaths, the share of each parent was to go to his or her children *per stirpes*. The testator left two sons and two daughters, the daughters having infant children living, all of whom were made defendants in this action, and the infants were represented therein by a guardian *ad litem* duly appointed. The action was brought by William Scholle for the partition of all the real estate held in common by him, Jacob, and the testator. The action was referred to a referee, who reported that a large portion of the property was incapable of partition and would have to be sold, and a judgment in accordance with this report was entered. Thereupon plaintiff and the defendant, Jacob Scholle, presented to the court their petition, setting forth their individual interests in the property and various other facts, and asking for leave to buy at the sale.

The petition came on for a hearing before the court on notice to all parties including the guardian *ad litem* for the infants and all the other beneficiaries under the bill, and the matter was referred to a referee to take testimony and report to the court together with his opinion whether Jacob and William Scholle could with safety be permitted to purchase. The referee after hearing the testimony, and full notice to all parties, reported that Jacob and William Scholle should be permitted to purchase, provided their bids were made subject to confirmation by the court, both as to their adequacy and fairness, and his report was subsequently confirmed by the court on notice to all parties. The property was subsequently exposed for sale by the referee appointed for that purpose, and Jacob and William Scholle were the highest bidders for property amounting in value to about $200,000. In pursuance of the directions contained in the interlocutory judgment, the same referee summoned all the parties before him, and took evidence as to the adequacy of the bids and prices paid, and after hearing all the parties found that they were adequate and so reported to the court, and his report was confirmed. Subsequently William and Jacob Scholle made a petition to the court to be relieved from their purchase on the ground that they could not obtain a good title because they were trustees named in the will, and at the same time the referee, appointed under the interlocutory judgment to sell the property, made a motion to compel them to complete their purchase. Both motions came on before the court at the same time on due notice to all parties interested in the property, including all the beneficiaries, and the court made an order directing William and Jacob Scholle to complete their purchase and denied their application to be relieved therefrom, and they appealed from that order to the general term, and from affirmance there to this court.

The general rule is not disputed that the purchase by a trustee, directly or indirectly, of any part of a trust estate, which he is empowered to to sell as a trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good

faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, have been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others. Fulton v. Whitney, 66 N. Y. 548; Torrey v. Band of New Orleans, 9 Paige, 649; Conger v. Ring, 11 Barb. 356. But where the the trustee has an interest to protect by bidding at a sale of the trust property, and he makes special application to the court for permission to bid, which upon the hearing of all the parties interested is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. See DeCaters v. DeChaumont, 3 Paige, 178; Gallatian v. Cunningham, 8 Cowen, 361; Davone v. Fanning, 2 Johns. Ch. 252; Bergen v. Bennett, 1 Cai. Cas. 20; Chapin v. Weed, 1 Clark Ch. 469; Colgate, ex'r. v. Colgate, 23 N. J. Eq. 372; Froneberger v. Lewis, 79 N. C. 426; Faucett v. Faucett, 1 Bush, 511; Michoud v. Girod, 4 How. (U. S.) 503; Campbell v. Walker, 5 Vesey, Jr. 678; Farmer v. Dean, 32 Beav. 327; Potter's Willard's Eq. Jur. 607; Lewin Trusts, 7th ed., 443; Godefroy Trusts, 184. Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that those appellants would get a good and perfect title to the lands purchased by them. And their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being. Code of Civ. Pro., §§ 1557-1577.

The order appealed from should, therefore, be affirmed, with costs.

All concur, except Miller J., absent.

Order affirmed.

The control of trusts and trustees belongs to equity, for trusts were not strictly cognizable at common law, but solely in equity;[1] for the most part, at least, there being few cases, except bailments and rights founded in contracts, and remediable by assumpsit, as for instance, in actions for money had and received, in which courts of law can give a remedy.[2] Courts of equity exercise a jealous and scrupulous examination into dealings between the trustee and *cestui qui trust*.[3] The trustee's duties are, to carry out the trust, to use care and diligence, to act with good faith.[4] Hence, the trustee can acquire in and for his own benefit the trust property, only as he can do so consistently with the sweeping and overlapping requirements.[5] The restrictions grow out of the relationship, and the relationship constitutes the protection to the *cestui qui trust*, not the good faith or want thereof of the trustee,[6] for it is for the former to abide or not by the transaction, and his action is controlling.[7] The general rule follows that a trustee may not so manage the trust as to gain personal advantage other than that contemplated by the inception of the trust, *e. g.*, his regular compensation, and if he does, the gain or advantage may be claimed by the *cestui qui trust*.[8]

He can not be allowed by his acts or declarations to work a disadvantage to a sale of the trust property.[9] The *cestui qui trust* may claim the trust property in whatsoever hands he may find it, or through whatever hands it may have passed, except where the rights of *bona fide* purchasers for value without notice intervene.[10] But not to commit a breach of peace.[11] It is not necessary to trace the trust fund into some specific property in order to enforce the trust. If it can be traced into the estate of the defaulting agent or trustee, this is sufficient.[12] If property is bought with trust funds by a trustee, it will be impressed with the original trust.[13] If the trustee speculates with trust funds, the advantage may be claimed by the *cestui*.[14] The latter may take the profits, or the principal with compound interest;[15] or he may proceed against the trustee personally or follow up the property which was the object of the trust.[16] But he cannot proceed

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[1] Wadkins v. Holman, 16 Pet. 25.

[2] Story's Eq. Jur. Vol. 2, p. 164, par. 961, 962; Milf. Eq. Pl. by Jur., 4; id. 133, 134; Cooper on Eq. Pl. Int. p. 27; 2 Bl. Com. 432; Foubl. Eq. B. 2 Ch. 1; 2 Pom. Eq., par. 79.

[3] 1 Story Eq. Jur. § 321; Willard's Eq. 187; Puzey v. Senter, 9 Wis. 370; Stewart v. Kissam, 2 Barb. Sup. Ct. 494; Davone v. Fanning, 2 J. C. R. 252; Gibson v. Jeyes, 6 Ves. Jr., 266.

[4] 2 Pomeroy's Eq. par. 1061; See Graham v. King, 50 Mo. 622; Howard v. Thornton, id. 291.

[5] Davone v. Fanning, *supra*; Farnum v. Brooks, 9 Pick., 212.

[6] Davone v. Fanning, *supra*.

[7] Campbell v. Walker, 5 Ves. 678, 680; Olliver v. Piatt, 3 How. 333; Pooley v. Quilter, 2 DeG. & J., 327; Harrison v. Monk, 10 Ala. 185; Crane v. Mitchell, Sandf. Ch. 251; Green v. Winter, 1 Johns. Ch. 27; Harvey v. Mancius, 7 Johns. Ch. 174.

[8] See note to 2 Story Eq., par. 1075, 1076.

[9] Goodwin v. Mix, 38 Ill. 115; Goode v. Comfort, 39 Mo. 313; Thomas v. James, 32 Ala. 733.

[10] See 2 Pom. Eq. par. 1048, 1058; Olliver v. Piatt, *supra*: Cook v. Tullis, 18 Wall. 332; U. S. v. State Bank, 93 U. S., 30; Nat. Bank v. Ins. Co., 104 U. S. 54; Waife v. Bate, 9 B. Mon. (Ky.), 208; Shannon's App. 27 Pa. St. 64; Her's Est. 1 Grant (Pa.) Cas. 272; Rosenbergers App. 26 Pa. St. 67; Treadwell v. McKean, 7 Bax. (Tenn.), 201; Miller v. Birdsong, id. 531.

[11] Brush v. Blanchard, 91 Ill. 31.

[12] Frith v. Cartland, 2 Hern. & M. 417; Pennell v. Deffel 4 DeG. M. & G. 372; Knotchbull v. Hallett, 13 Ch. Div., 696; Nat. Bank v. Ins. Co., *supra*; Van'Alen v. Amer. Nat. Bank, 52 N. Y. 1; People v. City Bank of Rochester, 96 N. Y. 32; Farmers' & M. Nat. Bank v. King, 57 Pa. St. 202; Peak v. Ellicott, 30 Kan. 156; s. c., 1 Pac. Rep. 499; McLeod v. Evans, N. W. Rep. Vol. 28, No. 3, p. 173 (Wis).

[13] Breit v. Yeaton, 10 Ill. 242.

[14] Schneffelin v. Stewart, 1 John. Ch. 620; Ringgold v. Swain, 1 Herr. & Gill, 11-86; Harland's Acc., Rawle, 323.

[15] 2 Kent Com. 230 (8 ed.); 'Gully v. Dunlap, 24 Miss. 410; Crowder v. Shackelford, 35 Miss. 360.

[16] Flagg v. Mann, 3 Grimm. 475, 486; Calhoun v. Burnett, 40 Miss. 599; Roberts v. Mansfield, 38 Ga. 452; Freeman v. Cook, 6 Ired. (N. C.) Eq. 379; Hawkins v. Hawkins, 1 Dru. & Sm. 75; Norman v. Cunningham, 5 Gratt. (Va.) 72; Lathrop v. Bampton, 31 Cal. 17.

against both, nor can he claim profit[17] of the investment together with the original fund and interest.[18] So long as the property can be identified,[19] it may be followed, whether the title was taken in the trustee or a third person with notice.[20] As to a purchaser with notice.[21] But a purchaser without notice for a valuable consideration is fully protected.[22] But the purchaser must clearly show that he is an innocent purchaser for value.[23] If he is a mere volunteer, the *cestui qui trust* may follow the property into his hands, whether he had notice or not.[24] But third parties cannot require the *cestui qui trust* to follow the trust property into the hands of purchasers for their protection.[25] And he cannot follow his property into the hands of a receiver, unless it can be identified.[26]

If a trustee change the investment of trust property without an order of court, he acts at his peril.[27] And where a trust instrument provides for a certain investment for certain persons, consent of the *cestui qui trust* will not validate a change.[28] Nor if the change be contrary to the provisions of the trust instrument.[29] And where the trust property is inalienable by statute, the consent to a change by the *cestui* will not validate it.[30] If a sale of the trust property by the trustee appears to be disproportionate and moved by the trustee's private interests, it will not be allowed to stand.[31] So a sale to pay debts, but disadvantageous to the trust property or interests.[32] But mere inadequacy of price will not invalidate a sale.[33] If, on a sale by the trustee the property cannot be identified, the trustee is personally liable.[34] But not if he has acted with good faith, or with the consent of the *cestui* in a proper case.[35] As to money.[36] But a court may direct a change to protect the trustee.[37] But the trustee cannot set up his office to avoid the sale for his own benefit.[38] He cannot dispute the trust, nor set up adverse title.[39] He cannot make admissions against trust fund or the *cestui*.[40] A husband who is trustee for his wife cannot, against her will, grant a license to cut timber off from trust property, nor submit the question of the right to do so to arbitration.[41] A trustee cannot settle a debt due him as trustee by cancelling one due from him individually to the trust debtor.[42] Nor can a trustee deed trust property to his wife—she then has only an equity subservient to that of the *cestui*.[43] He will not be allowed to derive a profit from the trust property.[44] And the great general rule is that he cannot purchase the trust property himself.[45] Notwithstanding the *cestui* consents that trust funds remain in the trustee's hands, it is still a debt due by

17 Barker v. Barker, 14 Wis. 131; See Bounce v. Holland, 68 Ga. 718.

18 Baker v. Dishrow, 25 Hun. 29; Gaines v. Ligardi, 1 Woods, 56.

19 Ferris v. Van Vechten, 73 N. Y. 113,

20 *Ex parte* Montefiore, 9 Bank Reg. 171; Georges v. Pye 7 Brr. C. C. 221; S. P. Pierce v. McKeeham, 3 Watts & S. (Pa.) 280; Bush v. Bush, 1 Stroble, (S. C.) Eq. 377; Bonsall's App. 1 Rawle, (Pa.) 274; Pailey v. Inglee, 2 Paige, 278; Kaufman v. Crawford, 9 Watts & S. (Pa.) 234; Hetts v. Richmond, R. R. Co., 4 Gratt. (Va) 482; Barksdale v. Finney, id. 338; Turner v. Pettigrew, 9 Humph. (Tenn.) 438; Blaisdell v. Stevens, 16 Vt. 179; Moffat v. McDonald, 11 Humph. (Tenn.) 457; Bonner v. Mullins. 4 Rice. (S. C.) Eq. 30; Sollee v. Croft, 7 id. 84; Martin v. Greer, 1 Ga. Dec. 109; Cheshies v. Cheshies, 3 Ired. (N. C.) Eq. 569; See Parker v. Jones, 67 Ala. 234; Allen v. Russell, 78 Ky., 105; Lathrop v. Bampton, *supra*.

21 McLeod v. First Nat. Bank, 42 Miss. 99; Jones v. Haddock, 41 Ala. 262; Joor v. Williams, 38 Miss. 546; Lathrop v. Bampton, 31 Cal.17; Aynesworth v. Halderman, 2 Dana (Ky.) 655; Ryan v. Doyle, 31 Ia., 53; Smith v. Walter, 49 Mo. 250; Joiner v. Cowing, 17 Hun. 256; Liggett v. Wall, 2 G. K. Morse, 149; Denn v. McKnight, 6 Halst. (N. J.) 385; Hood v. Falmstock, 1 Pa. St. 470; Wright v. Dame, 22 Pick. 55; Wigg v. Wigg, 1 Atk. 382.

22 Gerrard v. Saunders, 2 Ves. 457; Fagg's Case, 1 Vern. 52; 1 Ch. Cas. 68; Willoughby v. Willoughby, 1 T. R. 763; Boone v. Chiler, 10 Pet. 177; Varick v. Briggs, 6 Paige, 325; High v. Batte, 10 Yerg. (Tenn.) 335; Halstead v. Bk, 4 J. J. Marsh, (Ky.) 554; Dixon v. Caldwell, 15 Ohio St. 412; Dillaye v. Com. Bank, 51 N. Y. 345; Colesbury v. Dart, 58 Ala. 573; Hamilton v. Mound City Mut. S. Ins. Co. 3 Tenn. Ch. 124; Heilner v. Imbrie, 6 Serg. & R. (Pa.) 401; Tomkins v. Powell, 6 Leigh (Va.), 576.

23 Marshall v. Frank, 8 Pr. Ch. 480; Dobson v. Leadbeater, 13 Ves. 230; Hardingham v. Nichols, 3 Atk. 304; Kelsal v. Bennett, 1 id. 522; Hughes v. Garner, 2 Younge & C. Exch. 328; Hughes v. Garth, Amb. 421.

24 Mansell v. Mansell, 2 P. Wms. 679; Saunders v. Dehen, 2 Vern. 27; Pye v. George, 2 Yaek. 680; Boursett v. Savage, L. R. 2 Eq. 134; Syford v. Thurston, 16 N. H. 399.

25 Barr v. Cubbage, 52 Mo. 404; Smith v. Bowen, 35 N. Y. 83.

26 Illinois Trust & Sav. Bank v. Buffalo Bank, 15 Fed. Rep. 858.

27 Carniverse v. Bourguin, 2 Ga. 15; See Quick v. Fisher, 9 N. J. Eq. 802; Washington v. Emery, 4 Johns. Eq. 32.

28 Wood v. Wood, 5 Paige, 596; *Ex parte* Calmes, 1 Hill, (S. C.) Ch. 112; See Worrell's App. 23 Pa. St. 44,

29 Mundy v. Nawter, 3 Gratt. (Va.) 518.

30 Matter of Turner, 10 Barb. 552; Troy v. Troy, 1 Bush. (N. C.) Eq. 85.

31 Wormley v. Wormley, 8 Wheat. 421; Cadwell v. Brown, 36 Ill. 103.

32 Hunt v. Bass, 2 Dev. (N. C.) Eq. 292.

33 Singleton v. Scott, 11 Ia. 589; Franklin v. Osgood, 14 Johns. 527; Hintz v. Stingel, 1 Md. Ch. 283; Johnson v. Dorsey, 7 Gill (Md.) 269; Gibbs v. Cunningham, 1 Md. Ch. 44.

34 Lathrop v. Bampton, *supra:* See Hunt v. Bass, 2 Dev. (N. C.) Eq. 292.

35 Campbell v. Miller, 38 Ga. 304; But see Plympton v. Plympton, 6 Allen, 178, as to scope of consent.

36 School Trustees v. Kerwin, 25 Ill. 73.

37 Wood v. Wood, *supra;* Burrill v. Shiel, 2 Barb. 457; N. A. Coal Co. v. Dyett, 7 Paige.

38 McClure v. Miller, 1 Bailey (S. C.) Ch. 107.

39 Benjamin v. Gill, 45 Ga. 110; See Lockhart v. Camfield, 48 Miss. 470.

40 Thomas v. Bowman, 29 Ill. 426; Same, 30 Ill. 84; Mayraut v. Gingward, 3 Strob. (S. C.) Eq. 112; McKissick v. Pickle, 16 Pa. St. 140; Nordauns v. McLeran, 4 Melvin, 3 Johns. Eq. (N. C.) 195.

41 Thomas v. James, 32 Ala. 723.

42 Sweet v. Jeffrie , 67 Mo. 420.

43 Leitch v. Wells, 48 Barb. 637.

44 Coltrane v. Worrell, 30 Gratt. 434; Loring v. Salisbury, 125 Mass. 138.

45 Sallee v. Chandler, 26 Mo. 124; Jamison v. Glascock, 29 Mo. 191; Flagg v. Ely, 1 Edm. see Cas. (N. Y.) 206; Davis v. Wright, 2 Hill (S. C.), 560; Freeman v. Harwood, 49 Me. 195; Puzey v. Senier, 9 Wis. 370; Cook v. Berlin Mill, 43 Wis. 433; *In re*, Taylor Orphan Ass. 36 Wis. 534; Carson v. Marshall, 37 N. J. Eq. 213; Dodge v. Stevens, 94 N. Y. 209; Cavagnaro v. Don, 63 Cal. 227; Toole v. McKeernan, 48 N. Y. Sup. C. 163; Hollman's Estate, 13 Phila. 562; McAleer's App. 99 Pa. St. 138; Munn v. Berger, 70 Ill. 604; Brush v. Sherman, 80 id. 160; Star Fire Ins. Co. v. Palmer, 41 N. Y. Sup. Ct. 267; Spencer's App. 80 Pa. St. 317; Un. Slate Co. v. Tilton, 69 Me. 244; James v. James, 55 Ala. 525; Higgins v. Curtis, 82 Ill. 28; Ferguson v. Lowry, 54 Ala. 510; Michoud v. Girod, 4 How. 503; Childs v. Brace, 4 Paige, 309; DeCaters v. LeRoy de Chaumont, 3 id. 78; Boyd v. Hawkins, 2 Ired. (N. C.) Eq. 304; Campbell v. Johnson, 1 Sandf. Ch. 148; Thorp v. McCullum, 6 Ill. 614; Cram v. Mitchell, 1 Sandf. Ch. 251; Lenox v. Notribe, Hempst. 251; Renew v. Butler, 30 Ga. 954; Remick v. Butterfield, 31 N. H. 70; Den v. Wright, id. 175; Sheldon v. Sheldon, 13 Johns. 220; Abert v. Hammel, 18 N. J. L. 73; Bank of Orlean's v. Torry, 7 Hill, 260; Freeman v. Harwood, 49 Me. 195; Boynton v. Braslow, 53 Me. 362; Deaton v. Cobb, 1 Dev. (N. C.) Eq. 439; Sloo v. Law, 3 Blatch. 459; Page v. Naglee, 6 Cal. 241; Buell v. Buckingham, 16 Ia. 284; Pugh v. Bell, 1 J. J. Marsh (Ky.), 399;

the latter in his fiduciary capacity.[46] A sale by a trustee to himself is voidable.[47] And a breach of trust may be formally released by the *cestui*.[48] After the lapse of time, the *cestui* will be presumed in a proper case to have consented to or acquiesced in the disposition of the trust property.[49] The trustee may purchase from third parties to whom he has sold,[50] if the sale was in good faith,[51] but he must, at least, prove full price.[52] A purchase from a *cestui qui trust* by a trustee will only be sustained when it is *bond fide*, understood and agreed that the trust relation is dissolved, and no objection cognizable in equity arises.[53] The rule is stated to require on the part of the trustee, no fraud, no concealment, and no advantage of information.[54] But it was held that an administrator, who was interested in the estate, and the sale was fairly conducted, that he might purchase himself.[55]

While the *cestui* may consent to such a sale or ratify it, the mere receipt and acceptance by the beneficiary is not such a ratification as will prevent him from avoiding the sale.[56]

In some cases the rule is stated that the trustee cannot purchase unless he acts with the utmost fairness.[57] But the purchase by a trustee cannot be questioned by third parties.[58] A trustee for creditors cannot purchase trust property to hold for his own benefit.[59]

A sale by a trustee to a corporation of which he is owner of a large number of stocks, is invalid.[60] But where a trustee's public sale was duly advertised and fairly conducted, the fact that the sale was to a corporation which was the payee of the note secured by the trust deed, and was for a grossly inadequate sum, and that the trustee was the actuary of the corporation, was not sufficient to set aside such sale.[61] The fact that a trustee who holds certain mortgage securities, makes a declaration of trust to a bank in which it is stated that he held the mortgage securities to secure the indebtedness of the *cestui qui trust* to the bank, will not prevent the latter from buying in other claims against the estate.[62] A sale by trustees of a corporation who are trustees of another, of the property of the former to the latter, cannot stand.[63] Nor may a trustee sell to his co-trustees.[64] But to render such a sale utterly void, it is necessary to connect the purchaser with the acts of the seller.[65] Nor can a trustee purchase at a sale under a prior incumbrance to the prejudice of the *cestui que trust*.[66] He cannot defeat the trust by a purchase at a partition sale.[67] In such a case, the statute of limitations cannot be set up by him against the *cestui que trust*.[68] The intervention of third parties in an indirect sale by a trustee to himself is regarded with suspicion,[69] and will be scrupulously guarded,[70] as where a trustee caused a sale to his son and afterwards took the property for him.[71] An agent cannot sell his principal's property for the purpose of repurchasing it.[72] So, if executors appropriate assets to pay personal debts with the knowledge of the creditor, the latter may be required to repay the money to the estate.[73] Where a trustee loaned money to his *cestui*, a profligate, the court refused to authorize him to sell trust property to reimburse himself.[74] And if a trustee is incompetent to purchase for himself, he cannot purchase for third parties.[75]

It is a violation of the trust for several persons holding together a fiduciary relation to others, to contract with one or more of their own number in matters relating to such trust. So a contract between a school board and one of its members for the building of a school house, is voidable in equity by the district, and the fact that a majority of the board may act in letting such contract does not alter the rule, nor the fact that the contractor did not act with the board nor seek to influence its action.[76]

Equity deals with the directors of a private manufacturing corporation as trustees of the corporation. Where a contract of sale of real property of their *cestui que trust* to a stranger remains executory, trustees cannot purchase of such stranger. Where the nature of the agency has given the agent control of the principal's property, and peculiar opportunity of knowing its condition and value, a purchase by him will be voidable, unless he show affirmatively fair dealing and that he imparts to his principal his own knowledge.[77]

Where a party conveys away lands purchased by him with funds held in trust for another, and which

Richardson v. Spencer, 18 B. Mon. (Ky.) 450; Smith v. Townsend, 27 Md. 368; Emerson v. Atwater, 7 Mich. 12; Jones v. Smith, 33 Miss. 215; Stone v. Wickson, 10 Mo. 75; Newcomb v. Brooks, 16 W. Va. 32.

46 Crisfield v. Steele, 55 Md, 192.

47 Un. Slate Co. v. Tilton, 69 Me. 244; See last citations.

48 Cacks v. Barlow, 5 Redf. (N. Y.) 406.

49 Williams v. First Presb. Soc. 1 Oh. St. 478; North Car. R. R. Co. v. Drew, 3 Woods C. Ct. 691; Connolly v. Hammond, 51 Tex. 635.

50 Mortman v. Skinner, 12 N. J. Eq. 358; Jackson v. Brooks, 8 Wend. 426; DeBevoise v. Sanford, 1 Hoffm. 192; Birdwell v. Cain, 1 Coldw. 301.

51 Creveling v. Fritts, 34 N. J. Eq. 134.

52 May v. May, 7 Fla. 207.

53 Becket v. Tyler, 3 MacArthur, 319.

54 1 Storey Eq. Jur. § 321, note 4; See Brannon v. Oliver 2 Stewart, 47; Julian v. Reynolds, 8 Ala 680; Stallings v. Freeman, 2 Hill Ch. 401; Pratt v. Thornton, 28 Me. 335; But see McCartney v. Calhoun, 17 Ala. 301; Marshall v. Stevens, 8 Humph. 159; Beeson v. Beeson, 9 Barr. 279; McKinley v. Irvine, 13 Ala. 681.

55 Frazer's Ex. v. Lee, 42 Ala. 25.

56 Munn v. Berger, *supra;* Bush v. Sherman, *supra:* Star Fire Ins. Co. v. Palmer, 41 N. J. Sup. 267; Spencer's App. *supra;* Tatum v. McLellan, 50 Miss. 1; Un. Slate Co. v. Tilton, *supra:* James v. James, *supra:* Higgins v. Curtiss, 82 Ill. 28; Ferguson v. Lowry, *supra.*

57 Schwartz v. Wendell, Walk. (Mich.) 267; Kennedy v. Kennedy, 2 Ala. 571; Staats v. Bergen, 17 N. J. Eq. 554; Coffee v. Ruffin, 4 Cold. (Tenn.) 487; Puzey v. Senier, *supra.*

58 Baldwin v. Allison, 4 Minn. 25; McKinley v. Irvine, 13 Ala. 681; Woelper's App. 2 Pa. St. 71; Pointer v. Henderson, 7 Pa. St. 48; McNish v. Pope, 8 Rich. (S. C.) Eq. 112; Kemp v. Chalfant, 7 Minn. 487; See Jackson v. Walsh, 14 Johns. 407.

59 Campbell v. McLain, 51 Pa. St. 200.

60 Robbins v. Butler, 24 Ill. 387; See James v. Cowing, 17 Hun. 256.

61 Clark v. Trust Co. 100 U. S. 149.

62 Detroit Savings Bank v. Truesdail, 38 Mich. 430.

63 Wardens, etc. v. Rector, etc. 45 Barb. 356.

64 Ringgold v. Ringgold, 1 Har. & G. Md. 11.

65 Beeson v. Beeson, 9 Pa. St. 279.

66 Slade v. Van Vechten, 11 Paige, 21; Van Epps v. Van Epps, 9 Paige, 237; Jewett v. Miller, 10 N. Y. 402.

67 Williams v. Van Tuye, 2 O. St. 336.

68 Williams v. Van Tuye, *supra.*

69 Abbott v. Am. etc. Co. 33 Barb. 578; Smith v. Isaacs, 12 Mo. 106.

70 Wortman v. Skinner, 12 N. J. Eq. 358.

71 Murray v. Vanderbilt, 39 Barb. 140.

72 MacGregor v. Gardner, 14 Ia. 326; Morris v. Joseph, 1 W. Va. 256.

73 Anstin v. Willson, 21 Ind. 252.

74 McKnight v. Wilson, 2 Jones, (N. C.) Eq. 491.

75 Harnley v. Cramer, 4 Cow. 717; Gould v. Gould, 36 Barb. 270.

76 Pickett v. Sch. D. No. 1, 25 Wis. 551; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Whitecote v. Lawrence, 3 Vesey, 470; Story on Agency, § 210, *et seq:* People v. Town Board of Overyssel, 11 Mich. 222.

77 Crook v. Berlin, etc. Co. 43 Wis. 433; Cook v. Sherman, 4 McCrary C. Ct. 20.

he has failed to pay, and thus procures the purchase of said land from his grantee by a third party with means of his own, and the conveyance of the same to his wife, the trust springs upon the land.[78]

An administrator cannot become the purchaser of outstanding securities or claims against the estates, and then enforce them against the estate, but they became extinguished in his lands, and he can only be allowed what he actually paid for them.[79]

A trustee cannot award his own compensation.[80]

A wrongful purchase by a trustee of the trust property is not served by intermediate transfers.[81]

A trustee purchaser must show affirmatively the *bona fides* of the transactions; all presumptions are against it.[82]

Where a majority of trustees of a religious society executed a judgment note in the corporate name to persons who had a claim against the society, constituting a lien on the church building, and included in such note the amount of certain claims in favor of such trustees personally against the society, it was held a violation of their duty as trustees.[83] A trustee cannot pay his own claim due from the *cestui que trust* who disputes it, out of trust funds.[84] But sales by a trustee to himself may be ordered by a court having competent jurisdiction, protecting the interests of all parties.[85] Equity has jurisdiction to decree a sale of trust property from its inherent nature.[86] In such a case the trustee will be protected.[87] But where an investment was made by a trustee with the approval of the court in a State loan the interest on which was payable in August and February, and the bonds therefor being deposited in a bank, the latter's cashier drew the interest, and the State repaid the loan soon after the investment, of which the trustee had no notice till long after, he was held not liable for the interest which had ceased.[88] But the fact that securities taken by a trustee in an investment of the trust money have been set apart for the beneficiary upon a decree of the surrogate, the beneficiary consenting, will not necessarily relieve the trustee of liability for a negligent investment.[89]

Where, by the terms of a will, an executor also became a trustee or a donee of a trust power, powers being conferred and duties imposed on him, not as incidents of his office as executor, but as belonging to that of trustee, the trust and executorship are distinguishable and separate, and a separation commission may be allowed; but such separation may be determined without the aid of a judicial proceeding.[90]

F. C. HADDOCK,

Oshkosh, Wis.

[78] Gunn v. Blair, 9 Wis. 352.
[79] Gillett v. Gillett, 9 Wis. 195; Everston v. Tappen, 5 John Ch. 497; Stanley v. Mancins, 7 id. 179; Baugh v. Walker, 77 Va. 99.
[80] Gasse v. Beall, 3 Wis. 368.
[81] Ely v. Wilcox, 26 Wis. 91; O'Dell v. Rogers, 44 Wis. 136.
[82] Lathrop v. Pollard, 6 Col. 424.
[83] The U. B. Ch. New London v. Vandusen, 37 Wis. 54.
[84] Terry v. Bale, 1 Dem. (N. Y.) 452.
[85] Ansley v. Pace, 68 Ga. 402.
[86] Walker v. Singer, 80 Ky. 620.
[87] Faucett v. Faucett, 1 Bush (Ky.) 511; Cumberland, etc. Co. v. Sherman, 20 Md. 117; Ames v. Port Huron, etc. Co. 11 Mich. 139.
[88] Witmer's App. 87 Pa. St. 120.
[89] Roosevelt v. Roosevelt, 6 Abb. N. Cas. 447.
[90] Hurlburt v. Durant, 88 N. Y. 121.

BANKING — COMMERCIAL LAW — CERTIFIED CHECK-NEGLIGENCE OF COLLECTING BANK.

DROVERS ETC. BANK v. ANGLO-AMERICAN ETC. COMPANY.

Supreme Court of Illinois, May 15, 1886.

In the case of a certified check, the bank certifying the check is primarily liable for its payment, and it is negligent in a bank or agent for collection of such check to send it to the certifying bank itself for payment.

STATEMENT OF THE CASE.—The Anglo-American etc. Co., placed in the hands of the Drovers' etc. Bank, a check drawn and certified by Rice & Messmore, bankers of Cadillac, Michigan. The Drovers' Bank forwarded the check for collection to Rice & Messmore themselves. The check was not paid, and the Anglo-American Company brought suit for its amount against the Drovers' Bank and recovered judgment. The bank appealed.

Sleepers & Whiton, for appellant; *Page & Booth*, for appellee.

SCHOFIELD, J., delivered the opinion of the court,

Assuming, first, that appellant is not chargeable with knowledge of the existence of any other bank than that of Wright & Messmore, at Cadillac, Michigan; and second, that all the information it had, or could reasonably obtain at the time in respect to the financial standing of Rice & Messmore, was that they were solvent—were Rice & Messmore suitable agents to whom to transmit the certified check for collection after it was placed by appellee in appellant's possession? We do not think it is of much consequence whether appellant took the check as payment on account, or for the purpose merely of connection; for in either view it is entitled to show that the check, if it has discharged its duty by an effort to collect it, has availed nothing. Nor do we regard the evidence that certain banks in Chicago were in the habit of transmitting checks drawn on other banks, to those banks for collection, as affecting the present question, That evidence hardly comes up to the requirement of this court in regard to proof of a common-law custom, as laid down in Turner v. Dawson, 50 Ill. 85, and subsequent decisions of like import; but if it did, that custom does not include cases in which certified checks are sent for collection to the banks by which they are certified. In the case to which the evidence relates there is no primary liability on the part of the bank to which the check is sent; but in the case of a certified check the bank is primarily liable for its payment. So far as affects the present question, its position is precisely what it is where it makes its promissory note, bond, or other evidence of original indebtedness. Bickford v. First Nat. Bank, 42 Ill. 242, *et seq.*

The same person cannot be both debtor and creditor at the same time, and in respect of the same debt. How then can he,who is debtor,be at the same time,and in respect of the same debt,the disinterested agent of the creditor? Can it be said to be reasonable care, in selecting an agent, to select one known to be interested against the principal—to place the principal entirely in the hands of his adversary? The interest of the creditor,when his debtor is failing,is that steps be taken promptly, and prosecuted with vigor, to collect his debt. But at such a time the inclination of the creditor quite often, and it may be, sometimes his interest too, is to procrastinate. The debtor may often be interested in bringing about a compromise with his creditors whereby his debts may be discharged for less than their face. But the creditor, whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence in an agent holding for collection the promissory note given by one individual to another individual,to send the promissory note to the maker, trusting to him to make paypayment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction, as his conscience might permit. If this would not be held to be reasonable care and diligence,- why should the same conduct be held to be reasonable care and diligence when applied to a bank?

It is to be borne in mind appellant was not compelled to accept this check for collection. It assumed the burden voluntary, and it ought to have known that the certified check was not delivered to it merely to have it exchanged for the draft of Rice & Messmore on some other bank; for if this had been desired, it ought to have known that appellee would have obtained such a draft instead of the certified check. If appellant had no correspondent or agent at Cadillac,through whom to make collection,it should have so informed appellee,and then acted on the directions of appellee.This would have imposed no hardship,and would have protected all.It is true that when appellee placed the check in the hands of appellant, it was to be presumed that it was intended that appellant should collect by the ordinary and usual mode of of collecting in such cases; but neither from facts proved, nor as a matter of law, was it to be inferred that the check was to be surrendered to Rice & Messmore to use their pleasure as to the time and manner of payment and the disposition of the check. If appellant was willing to take the step without special stipulations, appellee was authorized to assume therefrom that it was able to collect, and that it had a proper agent through whom to do it promptly.

Indig v. City Band, 80 N. Y. 106, cited by counsel for appellant, is entirely different in its material facts from that in the present case, as we conceive. There the bank owed no primary duty to pay. The note was sent to it for collection, not from itself, but from the maker of the note. Its liability was solely that of an agent for collection.

In the recent case of Merchant's Nat. Bank v. Goodman, 2 Atl. Rep. 687, the Supreme Court of Pennsylvania however lay down the rule directly the opposite of that laid down by the New York Court of Appeals in Indig v. City Bank. The suit there involved the question whether the bank on which the check was drawn was a suitable agent to which to transmit the check for collection. And the court held that it was not. The court among other things said: "We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm,bank, corporation, or individual can be deemed a suitable agent in contemplation of law, to enforce in behalf of another a claim against itself. The only safe rule is to hold that an agent with whom a check or bill is deposited for collection must transmit it to a suitable agent, to demand payment in such manner that no loss can happen to any party, whether he is depositor and indorser, or the indorsee and holder. * * * We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril."

It is unnecessary to say that we concur in these views any further than they are applicable to the facts before us.

We find no cause to disturb the judgment below and it is therefore affirmed.

NOTE.—To confide the collection of a money obligation to its payor would seem to be *quasi agnum committere lupo*, but it seems that an Illinois bank has come to grief by this precise form of misplaced confidence.

A certified check is an accepted bill of exchange, and all the legal attributes of the latter attach equally to the former.[1] The liability of the drawer of the check is precisely that of the drawer of a bill of exchange accruing only upon the protest for non-payment.[2] Certifying a check to be "good," is nothing more nor less than a promise by the bank to pay it when presented.[3] It follows of course that by certifying a check, the bank becomes the principal debtor, its obligation to pay being absolute, while that of the drawer is subsidiary and contingent.

[1] Harker v. Anderson, 21 Wend. 372; Conger v. Armstrong, 3 Johns. Cas, 5.

[2] Smith v. Jones, 20 Wend. 192; Merchanis' Bank v. Spicer, 6 Wend. 445; Murray v. Judah, 6 Cow. 484; Conroy v. Warren, 3 Johns. Cas. 259; Glenn v. Noble, 1 Blackf. 104.

[3] Beckford v. First, etc. Bank, 42 Ill. 242.

All this is familiar law; the only questions raised by the principal case are whether it is negligence in the collecting bank to entrust the collection of the check to the bank by which it has been certified and is to be paid, and whether there is such a custom established as would defeat the charge of negligence.

It is the duty of the bank receiving for collection commercial paper payable at a distant point to transmit it speedily to a suitable agent at that place for collection, and when that is done, its liability is at an end.[4] The question is, who in case of the collection of a check is a suitable sub-agent. The Supreme Court of Pennsylvania says[5] that the bank upon which the check is drawn is not, because its interest is plainly to "delay instead of speeding payment." *A fortiori*, is that the case, when by certifying the check it had become the principal debtor.

As to custom, the well established rule on that subject is that a custom to be binding must be uniform, long established, and generally acquiesced in, and so well known that parties contracted with reference to it, when nothing is said to the contrary.[6]

It is often said that extremes meet, and it is a little curious to find that the managers of the defendant bank in this case, acute, wide awake men of business, *au fait* in all financial matters, as they no doubt are, have committed the precise blunder, for which, in a well-worn joke, the newspapers have laughed at two unsophisticated Dutch farmers. They were neighbors, friends, both ready money men who had never in their lives given or received a promissory note, but it so happened that one had occasion to borrow a small sum of money from the other. He suggested that "in case of death," he should give his note for the amount, and the note was drawn, inartistically perhaps, but probably it had the root of the matter in it. The question then arose; who was to keep the note? There was no precedent in the experience of either. The lender, however, solved the problem, shrewdly saying; "You keeps it Hans, for then you will know when the time comes for you to pay it."—[Ed. C. L. J.

[4] Merchants Bank v. Goodman, 2 Atl. R. 687, 690; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25; Fahens v. Mercantile Bank, 23 Pick. 330; Dorchester Bank v. New Eng. Bank, 1 Cush. 182; East Haddam v. Scoville, 12 Conn. 308; Aetna Ins. Co. v. Alton Bank, 25 Ill. 247.

[5] Merchants' Bank v. Goodman, *supra*.

[6] Turner v. Dawson, 50 Ill. 85.

WILL—CONSTRUCTION OF — LEGATEE—EXECUTOR—LIABILITY OF — DEVISE—REVOCATION.

ESTHER ALICE LONGSTROTH v. JOHN FREDERICK GOLDING, EXECUTOR.

*New Jersey Court of Chancery.**

1. Under the following clause in a will: "Having $2,000 out at interest at seven per cent., it is my will that the said sum shall be kept invested by my executor till my granddaughter, E. M. J. shall arrive at the age of twenty-five years, when I direct that the said sum of $2,000 shall be equally divided between her and my husband. * * * In the event of my husband's death before my granddaughter arrives at the age of twenty-five years, his share of said $1,000 to go to his legal representatives or such person or persons, in such share or shares, as he may by will direct."—*Held*, that the gift of the $2,000 was a general legacy, the testatrix's reference to its being "invested" in a particular way not being an important part of the description, and the $2,000 being only a part of her whole investment, which was $2,400; and *held*, *also*, that testatrix's husband having died before her, intestate, and the $2,400 having all been paid in to testatrix during her lifetime, his share thereof ($1,000), went to his legal representatives.

2. Under a devise of a house and lot, subject to a mortgage of $6,000 thereon—*Held*, that the devisee was entitled to the benefit of a payment of $1,000 made by the testatrix on account of the principal, after she had executed her will.

3. A general direction to two executors to pay testatrix's debts, and a devise to one of them, which he has accepted, neither renders him personally liable therefor nor the lands devised to him. Her debts are chargeable first on the residue, and the balance, if any, on the specific legacies and specific devises, ratably.

4. A share of the residue lapsed by the death of the legatee in the lifetime of the testatrix. *Held*, that she died intestate thereof; *held*, *also*, that, under the circumstances, that share was first liable for the payment of the debts and equally liable with the rest of the residue for the payment of the legacies. All the personal estate was bequeathed specifically, and the residue given in one mass after the gifts of the legacies, general and specific.

Bill for construction of will. On final hearing on pleadings and proofs.

Mr. W. H. Davis, for complainant; *Messrs. Parmly, Olendorf & Fisher*, for the executor; *Mr. John Griffing*, for the Andersons.

The Chancellor.

The bill is filed for a construction of the will of Esther M. Golding, deceased, late of Jersey City, who died May 27, 1879. The will is dated April 8, 1879. By the first clause, the testatrix directed her executors to pay her debts and funeral and testamentary expenses. By the second, she gave to the complainant, her granddaughter, by the name of Esther Maria Johnson, her jewelry and personal ornaments. By the third, she devised in fee to her son, John Frederick Golding, her house and lot, No. 242 East Fiftieth street, New York, where she then resided, subject to the mortgage of $6,000 and accrued interest thereon, and subject to the right of his father, her husband, John Frederick Golding, to occupy one of the rooms in the house, and she, also, in that clause, gave to her son John all the furniture, carpets, etc., and other articles in the house belonging to her, and not specifically bequeathed to the complainant. By the fourth, she gave the use of the before mentioned room to her husband. The fifth clause is as follows:

"Having $2,000 out at interest at seven per cent. it is my will that the said sum shall be kept invested by my executor till my granddaughter, Esther Maria Johnson, shall arrive at the age of twenty-five years, when I direct that the said sum

*Advance Sheets.

of $2,000 shall be equally divided between her and my husband, John Frederick Golding. It is my will that so long as my son, husband, and granddaughter can agree, they shall occupy the house I now reside in; my husband to have the room hereinbefore referred to, and my granddaughter to have a comfortable room, comfortably furnished, and the accrued interest on said sum of $2,000, to be used and applied toward the interest on the mortgage upon the said house devised to my said son. Whenever my son, granddaughter and husband find it disagreeable to occupy the said house together, as above stated, and my granddaughter shall desire to leave the same, then it is my will that from, and after that time the interest accruing on her share of said $2,000 be paid to her for her own use and benefit. In the event of my husband's death before my granddaughter arrives at the age of twenty-five years, his share of said $1,000 to go to his legal representatives or such person or persons, in such share or shares, as he may by will direct. In the event of my granddaughter, Esther Maria, dying before reaching the age of twenty-five years, leaving children, then the said $1,000 to go to her said children, share and share alike; and if she die without leaving children or any child, then said sum of $1,000 to be divided between my legal representatives, as though I had died intestate."

By the sixth clause she gave, devised, and bequeathed all the rest, residue and remainder of her estate, real and personal, to her son, John F. Golding, her granddaughter, the complainant, and her (the testatrix's) husband, John F. Golding. She appointed Rev. William McAllister, and her son, John F. Golding, executors and guardians of the person and estate of her granddaughter, the complainant. The will was proved June 9, 1885, by her son alone, Mr. McAllister having died. The testatrix's husband predeceased her. He died intestate. She left the following children, viz.: John Frederick Golding, Lucinda C. Andrew and Mahala Roden. Also the following children of her deceased daughters, viz.: Jeannie and William S. Anderson, children of her deceased daughter Esther, Charles A. King, son of her deceased daughter Cornelia, and Esther M. Johnson (the complainant), daughter of her deceased daughter, Elizabeth. After the making of the will (it was, as before stated, made April 8, 1879), and on the 1st of March, 1880, the testatrix bought a house in Jersey City tor $2,500, of which sum she paid $1,800 in cash, and for the balance, $700, gave a mortgage upon the property. On the 23d of May following she, having paid off the $700 mortgage, caused it to be canceled of record. On the 25th of May following she gave a mortgage for $1,000 upon the property, which is still an encumbrance thereon. Between the time of the date of the will and her death she paid $1,000 on account of the mortgage on the New York property, and she received the $2,000 mentioned in the fifth clause of the will. At the time of her death her entire property consisted of the house and lot in New York, which at that time was subject to a mortgage originally for $6,000 (but upon which $1,000 of the principal had been paid since she made the will), with interest payable at five per centum per annum; the house and lot in Jersey City, which was subject to a mortgage for $1,000; and the personal property specifically given to the complainant, appraised at 113.97, and that specifically gtven to the testatrix's son, which was appraised at $576.02. Her debts and funeral expenses will, it is supposed, amount to $500. The following are the questions presented: first, whether the gift of $2,000 in the fifth clause of the will is a specific or a general legacy; second, whether the share therein given to the testatrix's husband lapsed by his death in the lifetime of the testatrix, and if not, whether it goes to his next of kin; third, if the $2,000 legacy is general, from whence is it to be pain? And further, from what are the debts and funeral expenses to be paid?

The gift of the $2,000 is a general legacy. Whether the gift of a sum of money "invested" in a particular way is specific or not, depends upon the question whether the testator meant the legatee to have the sum, however invested, or whether the actual investment is the important part of the description. Theob. on Wills, 31. In this case the investment is not an important part of the description; for the testatrix contemplated that it might be changed. She provided for such change. The money is to be kept invested until the complainant shall arrive at the age of twenty-five years. The fact that the testator contemplated such change has frequently been held to be evidence that the investment was not material.

Again, the gift was of an entire sum invested, but only of part of larger sum. The fund was $2,400. The reference to the fact that the money was invested was due to the consideration that it was well invested, at a high legal rate of interest, on property in New York, and she desired that it should be kept well invested until the complainant had attained the age of twenty-five years. In Gillaume v. Adderley, 15 Ves. 384, the gift of a sum £5,000, or fifty thousand current rupees, afterwards described as "now vested in the [East India] company's bonds," was held to be not a specific but a general legacy. In Le Grice v. Finch, 3 Meriv. 50, a bequest of £500, which the testatrix and her mother then had out upon mortgage, was held to be a general and not a specific legacy. In Sparrow v. Josselyn, 16 Beav. 135, a gift of £10,000 sterling, being the testator's share of the capital then engaged in a certain banking business, was held to be a general legacy. In Mytton v. Mytton, L. R. (19 Eq.) 30, a legacy of the sum of "£3,000 invested in Indian security," was held to be a general and not specific. See, also, Bevan v. Attorney-General, 4 Giff. 361.

The legacy of $1,000 (half of the sum of $2,000 bequeathed by the fifth clause of the will) given to the testatrix's husband on the complainant's

attaining to the age of twenty-five years, with provision that in case he should die before that time it should go to his legal representatives, lapsed as to him by his death in the testatrix's lifetime, but not as to his legal representatives. Willing v. Baine, 3 P. Wms. 113; Hawk. Wills 244. He died intestate. The $2,400 were all paid in before the testatrix's death, as before stated.

The pecuniary legacies (those given by the fifth clause) are charged upon the residue. Corwine v. Corwine, 9 C. E. Gr. 579. If that prove insufficient, the legatees will have no right of recourse to the property given in specific legacies. 1 Rop. on Leg. 356.

The persons, other than John F. Golding the son, who claim the legacy of $2,000, insist that he is chargeable with their shares of that legacy, because he is executor of the will and real estate is thereby devised to him, which he has accepted The proposition cannot be maintained. The case cited, Brown v. Knapp, 79 N. Y. 136, does not support it. It applies the rule that when a legacy is given and the will directs that it be paid by a person to whom real estate is thereby devised, and such person accepts the devise, the devisee personally and the land devised are charged with the payment of the legacy. In that case, the devisee was the executor. But in the case in hand there is no direction in the will that the son pay the legacy.

Nor is the son chargeable with the $1,000 paid upon the mortgage of the New York property after the making of the will. That property was devised to him, "subject to the mortgage of $6,000." The devise is not a devise subject to a charge in favor of the estate, but a gift of the property subject to the encumbrance thereon, and the devisee is entitled to the benefit of the reduction of the mortgage by the testatrix.

The residuary clause gives to the three persons therein named—the complainant, the testatrix's son and the testatrix's husband—all the rest, residue and remainder of the estate, real and personal. As before stated, the husband predeceased the testatrix. The devisees, under the terms of the clause, were tenants in common. Rev. p. 167 § 78.

The testatrix must be held to have died intestate as to the share of her husband which lapsed. Hand v. Marcy, 1 Stew. Eq. 59.

All the personal estate (it was appraised at $689.99) was given specificially by the will to the complainant and the testatrix's son, John F. Golding. The amount of the debt is estimated at about $500. John F. Golding is not, nor is the land specificially devised to him, chargeable with the debts. Though he has accepted that land under the will, and the will directs that the debts and funeral expenses be paid by the executors, the direction is merely formal. There were two executors, and property was given by the will to only one of them. Warren v. Davis, 2 Myl. & K. 49; Theob. Wills 469. The residue is first liable for the payment of the debts and general legacies, and then the lands specificially devised and the specific legacies are together liable to pay ratably any deficiency. Long v. Short, 1 P. Wms. 403; Shreve v. Shreve, 2 C. E. Gr. 487; Thomas v. Thomas, Id. 356. The testatrix, by giving the whole of the residue of her estate, real and personal, in one mass, after giving the legacies, specific and general, evinced the intention to charge the legacies on the residuary estate, and though the gift as to one-third of the residue has lapsed, that third is equally liable with the rest to the payment of the general legacies. But in payment of the debts the share of the residue devised to the husband, and of which the testatrix died intestate, is first liable.

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NOTE.—The testator's giving a mortgage to a devisee on the lands previously devised to him is not a revocation of such devise;[1] or giving a stranger a lease of the premises for years, to commence after testator's death;[2] or a lease to the devisee for testator's life and that of his wife, if she should survive him.[3]

Where a testator directs his executors to pay his debts and legacies and then devises land to one of them, the land so devised is not chargeable therewith;[4] and so, if the lands are devised to the executors in unequal proportions.[5]

[1] Stubbs v. Houston, 33 Ala. 555; McTaggart v. Thompson, 14 Pa. St. 149; See Hall v. Dench, 2 Ch. Rep. 54; Perkins v. Walker, 1 Vern. 97; McLenahan v. McLenahan, 3 C. E. Gr. 101; Thomas v. Thomas, 2 C. E. Gr. 356; Wetmore v. Peck, 66 How. P;. 54; Bates v. Underhill, 3 Redf. 365.

[2] Hodgkinson v. Wood, Cro. Car. 23; Lamb v. Parker, 2 Vern. 495.

[3] Zimmerman v. Zimmerman, 23 Pa. St. 375; See, further, Wiggin v. Swett, 6 Metc. 194; Lanning v. Cole, 2 Hal. Ch. 102; Hall v. Bray, Coxe, 212.

[4] Braithwaite v. Britain, 1 Keen, 206; Laurens v. Reed, 14 Rich. Eq. 245, 263; Gaw v. Huffman, 12 Gratt. 628, 634; See Dowling v. Hudson, 17 Beav. 248; Bailey v. Bailey, L. R. (12 Ch. Div.) 268; Read v. Cather, 18 W. Va. 263.

[5] Wasse v. Heslington, 3 Myl. & K. 495; Harris v. Watkins, Kay. 438.

WEEKLY DIGEST OF RECENT CASES.

1. ASSIGNMENT FOR CREDITORS' BENEFIT.—*Preferences—Mortgage—Validity—Chattel Mortgage—Failure to Record—Effect on Creditors.*—An honest mortgage is not affected by its proximity to

a general assignment. Under the Michigan statutes any creditor may avoid an unrecorded mortgage who, during its absence from the record, has done anything on the basis of its non-existence,—such as giving a new credit, or extending an old one. *Root v. Harl*, S. C. Mich. July 15, 1886. 29 N. W. 29.

2. BANKS AND BANKING.—*Embezzlement of Funds of National Bank—Federal Jurisdiction—Section 711, Rev. St. U. S.*—The embezzlement of the funds of a national bank being an offense over which the federal courts have jurisdiction, any prosecution thereof by the State courts is in violation of section 711, Rev. St. U. S. *People v. Fonda*, S. C. Mich. July 15, 1886; 29 N. W. R. 26.

3. CONSTITUTION LAW.—*Effect of Variance between Enrolled Bill and Engrossed Bill, as shown by Legislative Journals.*—The statute relating to the drawing of grand and petit jurors approved Febuary 17th, 1885, excepting from its provisions certain named counties, is valid and operative in Colbert County, notwithstanding a variance between the enrolled bill, as signed by the presiding officers and approved by the Governor, and the bill shown by the legislative journals to have been passed by the two houses, by insertion of Clay among the excepted counties. The original enrolled bill, which was signed by the presiding officers, and approved by the Governor, is shown by inspection to be the same as the act passed by the two houses, except that in the enrolled bill Clay county is named among the excepted counties. The constitutionality of a statute, where there was a similar difference between the act as passed and as enrolled and approved, was considered in Stein v. Leper, at the Dec. Term 1885 of this court; and on the authority of that case, we hold that the statute in question is constitutional and operative in Colbert County. *Abernathy v. The State of Ala.*, S. C. Ala. December Term, 1885.

4. ———.*Essentials to Validity of Statute.*—Where the journal of each house of the General Assembly shows that a law received the concurrence of the number of members required by the Constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer as required by section 17, article 2 of the Constitution, its authenticity cannot be impeached by parol evidence that one or more of the members of either house, recorded as concurring in its adoption, had, prior thereto, been seated, upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such member or members was necessary to the number of votes required by the Constitution for the passage of the law. The members so seated are at least *de facto* members of the house to which they belong, and the validity of the title by which they occupy their seats cannot be inquired into by the courts, for the purpose of affecting the validity of laws enacted by the Legislature in which they hold seats. The Act of the General Assembly, passed May 17, 1886, entitled "An Act to Establish an Efficient Board of Public Affairs in Cities of the First Grade of the First Class" (83 Ohio L. 173), is within the legislative power conferred on the General Assembly by section 1, article 1, and the requirement of section 6, article 8, of the Constitution; and does not by its provisions vesting the appointment of the board in the governor of the State, impair any of the undelegated powers which by section 20, article 1, are declared to "remain with the people." Whether laws so enacted for the government of cities and villiages are wise or unwise is left, by the Constitution, to the wisdom of the Legislature, and the courts have no power to hold them invalid, although they may differ with the Legislature as to the policy of such laws. *State ex rel v. Smith*, S. C. Ohio; June 29, 1886; 4 West Rep. 101.

5. ———.*Mining Coal—Act Compelling Measurement of Coal by Weight as Basis of Wages, Unconstitutional—Record of Weight for Public Information—Compelling Keeping of, a Taking for Public Use—Coal Mining not a Public Employment.*—The act of June 29, 1885, amendatory of the act of June 14, 1883, to provide for the weighing of coal at the mines, requiring the owners and operators of mines to provide scales, and weigh all coal taken out, and making such weight the basis of wages, is unconstitutional. It is depriving such owners and operators, who made contracts for wages on the basis of a certain rate per box, of their property without due process of law. See Bill of Rights, § 2; Const. 1870, art. 2 § 2, (1 Starr & C. St. 99.) Such act is indefensible on the ground that it requires the keeping of a public record for the information of the public. The requirement that such a record be kept is a taking for public use, and, unless compensation be provided, the act so taking is void. Const. 1870, art. 2, § 13, (1 Starr & C. St. 105.) Such act cannot be sustained on the ground that the mining of coal is public employment, and subject to necessary regulations for the public good. The mining of coal was not at common law affected with a public use, and is not, like the business of warehousing grain, or of common carriers, a business, upon the followers of which the public are compelled to call. The references to coal mining in the constitution, for the protection of miners, (Const. 1870, art. 4, § 29; 1 Starr & C. St. 122,) and for the laying of railway switches to mines, (Const. 1870, art. 13, § 5; 1 Starr & C. 165,) impose no such character on the mining. *Millet v. People*, S. C. Ill. June 12, 1889. 7 N. E. Rep. 631.

6. CONTEMPT.—*Divorce—Alimony—Judicial Discretion.*—On an appeal from an order of commitment for contempt, in not paying temporary alimony to complainant in an action for divorce by the defendant, *held*, that, on the facts shown, the judge of the circuit court acted within his discretion. *Rossman v. Rossman*, S. C. Mich. July 15, 1886. 29 N. W. Rep. 23.

7. CONTRACT—*Public Policy—Compounding Felony.*—Where a person has given his promissory note to compound a crime, and has been compelled to pay the same to a *bona fide* holder for value, to whom it was transferred before maturity, he cannot maintain an action against the one to whom the note was given, to recover back the money so paid by him. Although the plaintiff was influenced to give the note by the duress, undue influence or threats of defendant, yet if, at the same time, both parties intended, by giving the note, to compound a felony, they were in *pari delicto*. If the compounding of a felony entered into and formed a part of the consideration of the note, or if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, the plaintiff cannot recover. *Haynes v. Rudd*, N. Y. Ct. of App. June 1, 1886. 3 Cent. R. 449.

8. CORPORATION—*Ultra Vires—Contract beyond Corporate Powers Void.*—Where the charter of a corpor-

ate body shows that it was organized for the purpose of "manufacturing and repairing machinery," and was expressly forbidden from contracting and debt without the written consent of the board of directors, the doctrine of *ultra vires* may be invoked in an action against them as endorsers on a note for the purchase price of machinery sold as agents. In rendering the opinion of the court, Somerville, J., said: "The power to manufacture and repair machinery, coupled with a prohibition against the creation of debts, except in a mode particularly specified, does not confer by implication the power to act as agent in making sales of machinery manufactured by others, and of taking and endorsing notes executed for the purchase. money. The act was clearly *ultra vires*, and being such, under the uniform rulings of this court, the contract was void, and the doctrine of estoppel cannot be invoked by the plaintiff to debar the interposition of this defense. To permit this, would practically be giving the sanction of the conrt to the doctrine, that a corporation, can become omnipotent by arrogating to itself power forbidden by its charter, which is the vital source and origin of all corporate power. Chambers v. Falkner, 65 Ala. 449; Marion Savings Bank v. Dunklin, 34 Ala. 471; Grand Lodge of Alabama v. Waddill, 36 Ala. 313; Waddill v. Ala. & Tenn. R. R. Co., 35 Ala. 323; City Council v. Montgomery 31 Ala. 76; Wood's Field on Corp. (2nd Ed.) § 243. "*The Westinghouse Machine Co. v. The Montgomery Iron Works*, S. C. Ala. Dec. Term, 1885-86.

9. CRIMINAL LAW—*Embezzlement—Money in Hand before Fiduciary Capacity Began — Evidence — Time Money was Spent — Jury.* — Embezzelment cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity. In a case where a party is upon trial for embezzlement, his report that he had, meaning that he owed the corporation, a certain sum of money at the time of his election as treasurer, should have been submitted to the jury, for their determination whether it was before or after such election that the money was spent by him. *Lee v. Commonwealth*, Ky. Ct. of App. June 15, 1886. 1 S. W. R. 4.

10. ———. *Criminal Practice— Witness—Contradicting Commonwealth's Witness in Criminal Case. Continuance — Murder Trial — Enticing Away Witness.* — Where one of the Commonwealth's witnesses has been recalled by the defense, and foundation laid for contradicting him, it is error for the trial court to refuse to allow a witness for the defense to give evidence contradicting the first witness, and showing that the evidence which he gave, important and prejudicial to the defendant, was false. Where a witness for the defense was induced to leave the court before testifying, by a person who was aiding the prosecution, and the defendant made an affidavit that the witness' attendance could not afterwards be procured, and that her evidence would show that the accused took the life of the deceased in necessary self-defense, *held*, that it was error to overrule defendant's motion to discharge the jury and to continue the case. *Joseph v. Commonwealth*, Kentucky Ct. of App. June 15, 1886. 1 S. W. R. 4.

11. EJECTMENT—*Title—Evidence — Executors and Administrators—Sale— Conveyance by Administrator.*—The plaintiff in ejectmentment must recover, if at all, on the strength of his own title, rather than on the weakness of the title asserted his adversary, and the burden of proof is on him throughout, the actuality of defendant's possession being itself *prima facie*. An administrator's deed conveys no title, unless executed pursuant to the decree or order of a court of competent jurisdiction. *Dawson v. Parham*, S. C. Ark. June 19, 1886. 1 S. W. Rep. 72.

12. EMBEZZLEMENT— *Waiver of Tort — Set-off—Pleading—Findings.*—Where the agent or clerk of a principal is guilty of embezzlement of his principal's goods, the principal may waive the tort if he chooses, and treat his cause of action against his agent or clerk as one arising upon an implied contract; and if the agent or clerk is the owner of a note the executed by the principal, in an action thereon the principal may plead as a set-off to the note the value of his goods embezzled and converted to his own use by his agent or clerk. An action was brought by the wife of W., upon a promissory note payable to her order. The defendant alleged in his answer that the wife was not the real party in interest, but that the husband furnished the consideration of the note, and was the owner thereof, and also alleged a set-off existing in favor of the defendant against the husband for a sum exceeding the amount of the note. Upon motion of the wife the set-off was stricken out. The other allegations in the answer were permitted to stand. The case was tried by the court without a jury; and the court found that the plaintiff was the real party in interest, and thereupon rendered judgment against the defendant. *Held*, that although the district court committed error in striking out the set-off, the error, under the findings, cannot be said to be material, as it did not affect or prejudice in any way the substantial rights of the defendant. *Challiss v. Wylie*, S. C. Kans., July 9, 1886. 3 Kans. L. Jour. 357.

13. EQUITY—*Cloud upon Title — Equity Jurisdiction.*—Relief purely equitable in character, granted in a cause needs for its support the proof of some facts giving the court jurisdiction of such a cause of action. In an action to obtain the cancellation of a deed as a cloud upon plaintiff's title, his claim for relief rests upon his ownership of the premises and where this is totally unproved, he is not entitled to judgment. A deed purporting to have been executed by a referee in a partition action, without proof that any of the parties in the action or their grantors ever had title to or possession of the premises or any part thereof, is not sufficient to show title in the grantee as against a defendant, a stranger to the partition action, who was in possession of the premises before, at, and since the execution of the deed, under a duly executed tax deed thereof. Where the findings of fact dy not establish a legal right on the part of the successful party to the relief granted, and there is nothing in the evidence to show such right, an exception to the legal conclusion of the court, directing judgment raises the question whether, upon all of the facts found, the party succeeding is entitled to the judgment directed. Where equitable relief is demanded on the grounds of the want of an adequate remedy at law, and the facts show the existence of such a remedy and the falsity of the averment, the complaint is insufficient. The owner, out of possession,

cannot sustain an equitable action to remove a cloud upon title, nor to establish a legal title or cover possession, unless other circumstances give equitable jurisdiction. Where the invalidity of the disputed title appears upon the face of the conveyance or in any proof which the claimant is required to produce in order to maintain an action to establish it, no suit whatever can be maintained in equity to set it aside. *Moores v. Townshend*, N. Y. Ct. App., June 1, 1886. 3 Cent Rep. 442.

14. EQUITY.—*Practice—When Injunction will not lie Against Unlawful Detainer Suit.*—Where a bill is filed for the purpose of correcting the numbers in a deed to certain lands, made by M. to B., and for the purpose of enjoining an unlawful detainer suit in favor of M. and against B. for the lands embraced or intended to be embraced in the deed sought to be reformed, as title is not the subject of inquiry in said suit, the bill sets forth no equitable right to an injunction against the recovery complained of, or against its enforcement. If, instead of unlawful detainer, M. had brought ejectment, or the statutory real action, then a reformation of the deed would have been necessary to B's defense, for title would have been the issue in the cause. * * * The bill avers that the suit and recovery were in unlawful detainer, and the injunction prayed for and obtained was against the enforcement of that judgment. In such suit title can not be inquired into. A tenancy, or authorized possession, and its termination or forfeiture, are the conditions of its maintenance. *Murphree v. Bishop*, S. C. Alabama, December Term, 1885-86.

15. ESTOPPEL. — *Judgment — Second Appeal — Wrong Decision.*—where, in a former action, the appointment of plaintiff as general receiver was alleged in the complaint, and denied in the answer, and the same issue was framed and tried as in this, the legality of the appointment is *res adjudicata*, and cannot be the subject of review upon this appeal. Even if the decision was wrong, it does not impair the effect of the former judgment as a bar to the right to raise the same question. Nor does it change the effect of the judgment because the amount recovered was not sufficient to entitle the plaintiff to appeal, as a matter of right, from the general term to this court. *Griffin v. Long Island etc. Co.*, N. Y. Ct. of Appl; June 1, 1886, 7 N. East R. 735.

16. EVIDENCE.—*Confession—Corpus Delicti—Admissibility of Confession—Finding Stolen Property.*—In a criminal prosecution, the *corpus delicti* cannot be shown by the prisoner's confessions, unless they appear to the court to have been absolutely involuntary, and free from compulsion or fear. The discovery of stolen property through information furnished by the accused does not warrant the admission of his confession that it was stolen by him. *Yates v. States*, S. C. Ark. June 5, 1886, 1 S. W. Rep. 65.

17. FENCES.—*Trespass—Common of Pasture.*—In this State, except where the rule is changed by local statutes, uninclosed lands are regarded as common of pasture, over which cattle or stock may be suffered to run at large; and if the owner of the lands desires to protect himself from damage, he must erect and maintain a lawful fence around them. The owner of lands not inclosed by a lawful fence, whose rights are only defensive, may have the trespassing animals estrayed, and may use all proper means to drive them out of his inclosure, taking care to employ no unnecessary force; but, for any injury which is the natural and proximate consequence of a wrongful act on his part, outside of these defensive measures, he is liable to the statutory penalty (Code § 1587) of five times the amount of the injury. The plaintiff's horse having been taught by the defendant while trespassing in his field not inclosed by a lawful fence, tied with a rope to a tree, and here left for twenty-four hours, when he was found dead; the liability of the defendant does not depend on the question of negligence, but on the question whether the injury was the natural and proximate consequence of his unlawful act; though he would not be liable for the death of the animal, if it resulted from other causes.—*Wilhite v. Spearman*, S. C. Ala.

18. FRAUD.—*Mortgage of Homestead—Homestead—Mortgage—Acknowledgment—Wife's Separate Estate—Waiver of Dower.*—Evidence and circumstances considered, and *held* not to sustain a charge of fraud in omitting to except from a mortgage the homestead of plaintiffs. When a married woman executes a mortgage on real estate, including the homestead, the title to which stands in her name, an acknowledgment made by her and her husband to the effect that the same was their act and deed, for the purposes therein mentioned, and that the wife relinquishes all her right to dower and homestead, is sufficient. *Kimmell v. Carnthers*, Ky. Ct. of App. June 5, 1886, 1 S. W. Rep. 2.

19. HABEAS CORPUS.—*Contempt—Fine—Order of Imprisonment for Non-Payment—Such Order not Reviewable by Habeas Corpus.*—Where a witness is properly brought before the court, and, for failure to answer question propounded, he is fined for contempt, and an order is entered that he stand committed until the same and all costs are paid, such order is in the nature of a final process or means of enforcing the judgment, and not a judgment in itself. A *habeas corpus* will not lie in such case, as it does not come within any of the statutory grounds for a *habeas corpus* for a prisoner under process. 1 Starr & C. St. c. 65, par. 22. A writ of error with an order for a *supersedeas* is the proper remedy. *In Re Smith*, S. C. Ill. May 24, 1886, 7 N. East. Rep. 683.

20. INSURANCE.—*Fire Insurance Inventory.*—Where an application for insurance against loss by fire was obtained by one not an agent of the defendant, but a broker doing the business under an arrangement with defendant's duly authorized agent, by whom it was sent to defendant, and the defendant returned it for additional information as to the ownership and occupation of the property to be insured, and the agent gave the application to the broker with instructions to obtain the answers from the applicant, and the broker took the application away and returned it with the answers written in his own handwriting and not in accordance with the facts, although the broker at the time had full information as to the facts; *Held*, That the act of the broker under these circumstances was the act of the agent, and the knowledge of the broker, no matter when obtained, if before the answers were given, was the knowledge of the defendant, and it was estopped from setting up such false answers in defense. It was the duty of the assured to supply the defendant with an honest inventory of the property damaged, and although he could properly employ his wife to make the inventory of household goods destroyed, if he makes

oath to one thus made by his wife containing false statements and fraudulent claims, without knowing of its false claim and without scrutiny, he thereby adopts and makes the fraud his own and cannot recover. *Mullen v. Vermont etc. Co.*, June 26, 1886, 15 Ins. L. Jour. 561.

21. LIMITATIONS.—*Statute of Adverse Possesion.—Rule in Shelley's Case.*—Uninterrupted possession by defendant and his vendor, for twenty eight years before suit brought, under written claim of title, accompanied by the usual acts of ownership, "perfects a title against all the world, unless there be a claimant armed with a paramount title, yet so circumstanced that he could not assert his title until the occurrence of an event which has happened within less than ten years before the commencement of the suit." The "Rule in Shelley's case," as at common law, prevailed, in this State until the 17th January, 1353, when the Code of 1852 became operative; and deeds and wills which took effect before that date, are governed by it. A deed, executed in 1841, by which lands were conveyed to a trustee, "for the purpose of providing a permanent domicile and home for the said Jane C. M," a married woman, "and such family as she may have, for their use and benefit during her natural life,and at her death descend to and be equally divided among and between her heirs," under the operation of the rule in Shelley's case, rested the entire estate in Mrs. M.; and if her children took any present interest, as members of her "family," their right to sue for it was not postponed until her death. Reversed and remanded. *McQueen v. Logan*, S. C. Ala.

22. STATUTE OF LIMITATIONS.—*Begins to Run, When—Absconding Debtor.*—Whenever a cause of action accrues, the statute of limitations begins to run directly against it, and the continuous operation of the statute cannot be suspended by any subsequent act of the debtor. Where a debtor, against whom a cause of action exists, absconds, but subsequently returns, the entire period of his absence is to be computed as a part of the time prescribed by the statute. *Richardson v. Coggswell*, S. C. Ark. June 6, 1886, 1 S. W. Rep. 51.

23. MASTER AND SERVANT—*Injuries to Servant by Negligence — Breaking of Scaffolding — Fellow-Servants.*—Where an employer furnishes suitable materials, and employs competent carpenters, to construct scaffolding, to be used by them in putting the cornice upon a building, and the same scaffold is subsequently used by painters hired to paint the cornice, *held*, that the carpenters who constructed the scaffolding and the painters are fellow-servants, and that the employer is not liable for injuries caused to one of the painters by the breaking of the scaffolding. *Hoar v. Merritt*, S. C. Mich., July 15, 1886. 29 N. W. R. 15.

24. MORTGAGES—*Rights of Mortgagee—Advances—Crops—Rents and Profits.*—A mortgagee of growing crops may advance sufficient to preserve them from waste and destruction, and the advances thus made add to his mortgage debt, and are chargeable against the mortgagor in an equitable accounting. A mortgagee in actual possession must devote the entire rents and profits to the payment of the mortgage, and can divert no part thereof towards the satisfaction of other and unsecured claims due him from the mortgagor, without the express assent of the latter. *Caldwell v. Hale*, S. C. Ark., June 19, 1886. 1 S. W. R. 62.

25. ———. *Deed Absolute in Form — Conditional Sale.*—Where the controversy is whether a conveyance, absolute in form, was intended as an unconditional sale or as a mortgage, the evidence must be clear and convincing to overcome the terms of the writing; but, where the controversy is whether it was intended as a conditional, sale, with a reservation of the right to re-purchase, or as a mortgage, a court of equity leans to the latter construction. The concurring intention of both parties must be shown, before the transaction can be established and treated as a mortgage; and if it appear that the defendant considered and intended it as a conditional sale, though the complainant intended it as a mortgage, this does not make a "doubtful case," nor require the court to adopt the complainant's construction. The fact that the parties originated in an application for a loan of money, is regarded as one of the principal *indicia* of a mortgage; but, when it is shown that the application for a loan was repeatedly declined, and, after the negotiations were broken off, the defendant's proposal of a conditional sale was accepted, the weight of that circumstance is destroyed. Great disparity between the price paid and the value of the property, is also one of the *indicia* of a mortgage; but, when it is shown that the property was not in demand at the time, its value being prospective and speculative, a subsequent advance in its value, arising from unforseen and adventitious circumstances, cannot be considered in this connection. If the bill alleges that the transaction was a mortgage, the complainant can obtain no relief founded on a conditional sale. *Douglas v. Moody*, S. C. Ala.

26. NEGLIGENCE.—A child riding upon the platform of a railroad car without payment of fare is a trespasser; but this fact will not exempt the company from payment of damages if its driver ejects him in a manner which endangers life or limb; as here, by compelling him to jump backward from the platform while the car was in motion. *Biddle v. Hestonville etc. Co.*, S. C. Penn., May 3, 1886. 3 Cent. R. 404.

27. OFFICERS— *Constitutional Limit — Successor Elected but Dying before Qualifying.* — Though a public officer, who is empowered to hold office for a certain term and until his successor is elected or appointed and qualifies, will hold over, after the election of a successor who dies before qualification; but if he has held the office for the full term allowed by the constitution which visqualifiies him to hold longer, the office is vacant though his successor has not qualified after election or appointment. *Gosman v. State*, S. C. Ind. April 16, 1886. 22 Rep. 107.

28. PARTNERSHIP — *Deed or Mortgage in Firm Name—Rights of Partners—Mortgage—Release —Quit-claim Deed.*—A conveyance or mortgage of real estate, in which a partnership, by its firm name, is named as grantee or mortgagee, operates, in law, only in favor of a partner whose name is in the firm name, and not in favor of a partner whose name is not contained in the firm name. A quit-claim deed by a mortgagee of real estate to one having an estate in the land operates as a release of the mortgage in favor of such person. *Gille v. Hunt*, S. C. Minn., July 7, 1886; 29 N. W. Rep. 2.

29. ———. *Surviving Partner—Insolvency—General Assignment—Assignment for the Benefit of Cred-*

itors—By Surviving Partner—Retention of Goods by Him.—The surviving partner of an insolvent firm may make a general assignment. A general assignment by a surviving partner is a valid instrument, though he retains a part of the firm property. *Emerson v. Senter*, S. C. U. S., April 12, 1886; 22 Rep. 129.

30. PLEADING—*Contract—Acceptance of Contract.*—A demurrer to a plea reaches any substantial defect in the declaration, or the count thereof to which the plea has been tendered; but not a defect of mere form. The appellant, upon whom an order was drawn in favor of the appellee by H. & J., for five hundred and seventy dollars "balance due on the house we are building for you," accepted it is as follows: "I accept the above when the house is finished according to contract and delivered. To pay said sum by the first of January, 1885, interest to commence when said building is delivered." *Held*, To be a conditional acceptance, and that no recovery could be had against the acceptor upon the instrument until the house has been finished according to the contract, whatever it might be and delivered. The declaration upon a conditional acceptance must allege a performance of the condition. An allegation of a delivery of a house and that the acceptor has been in possession, is not a sufficient allegation of performance of the conditions that the house has been "finished according to contract and delivered," upon which a draft is payable. The allegation that the plaintiff, the payee, gave the acceptor notice that he held himself ready to complete the house according to contract or to pay her a reasonable sum for his failure if she point out to him the deficiencies or omissions, and that she refused to do so, and that she refused to permit him to enter the house for, the purpose of completing it according to contract, is not a sufficient averment of performance of the conditions named in the acceptance, whether considered alone or in connection with above allegation of delivery to, and possession by the acceptor. If, in any case of a non-performance by a drawer of the conditions named by the acceptor in the acceptance, the payee has a a right of action against the acceptor who refuses to permit him to perform the conditions, which the drawer was under contract to perform, such right of action is not upon the acceptance, but is one of special action on the case for damages occasioned by the acceptor's refusal and prevention of performance by the payee. Where there is both a demurrer and a replication to a plea, it is a matter of discretion with the Circuit Court as to which issue shall be first disposed of. Assuming that such discretion can ever be controlled, it cannot be done when there is no showing of an abuse of the discretion. Where an exceptton has been taken upon the trial to the refusal of the Circuit Judge to give ceriain instructions to the jury, and the instructions so refused have been then and there written out and endorsed as refused, and the exception noted and signed by the judge, and the paper filed, it constitutes of itself a special bill of exceptions as to such instructions, and when it has been incorporated in this shape into the general bill of exceptions, and such general bill has been subsequently struck from the record by an order of the appellate court, because it was not settled in the time allowed, the special bill is not affected by such order and will be considered as if such order had not been made. Where there is no bill of exceptions showing that any exception was taken to an instruction given to the jury or to the exclusion or admission of evidence, the ruling of the court upon such instructions or testimony cannot be reviewed on appeal. Where there has been a refusal to give certain instructions to the jury, and the testimony upon which they were based is not incorporated in the bill of exceptions, it will be assumed that there was no error in refusing to give them, and they will not be considered on appeal. Where there is one good count in a declaration and a plea thereto and issue joined thereon, and there is no bill of exceptions showing the evidence adduced on the trial, the appellate court will presume that the evidence was sufficient to sustain the verdict rendered in favor of the plaintiff. *Myrick v. Merritt*, S. C. Fla., June Term, 1886.

31. TAXATION — *Exemption of Church Property—Title must be in Church Society — Dedication of Property by Religious Services, Immaterial to Question of Exemption.*—In order to make property exempt from taxation as church property under the provisions of the constitution and revenue act, the title to the property must be in a religious corporation or church society as a body. A church edifice, and the lot upon which it stands, owned by a citizen individually, and regularly used for religious services, is not exempt from taxation. The fact that such property has been dedicated to religious uses, by the holding of religious services of a dedicatory character therein, is immaterial to the legal question concernining its exemption from taxation. *People ex rel v. Anderson*, S. C. Ill. May 14, 1886. 7 N. East. R. 625.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

18. Has an Indiana Turnpike Company the right to prohibit the passage upon its roads of a steam traction engine used for threshing purposes? The conductor of the engine offering to pay all reasonable toll. 2. If it has, and no such prohibition is made, and the engine is injured while passing over the road, by reason of a defect in the bridge not known to the conductor of the engine; is the Turnpike Company liable for the damages to the engine? E. B. S.

Cite authorities, if any.

QUERIES ANSWERED.

Query No. 11. [23 Cent. L. J. 94.] A. B. & C. sign a petition for dramshop license; § 4 of Dramshops, session Acts, 1883, of Mo. C. afterwards reconsiders his action and in writing, petitions the county court to cause his name to be erased from or held for naught on dramshop petition. His plea being filed before the 4th day of July, and before action had on dramshop petition, should the court grant his prayer? J.

Answer. Yes; party who having signed petition, afterwards signs a remonstrance, must be regarded not as a petitioner, but a remonstrant. 26 N. W. Red. 25. (Iowa Case.) W. J. H.

RECENT PUBLICATIONS.

THE AMERICAN REPORTS, Containing all Decisions of General Interest Decided in the Courts of Last Resort in the Several States, With Notes and References by Irving Browne. Vol. LIII, Containing all Cases of General Authority in the following Reports: 72 Georgia; 111 Illinois; 103 Indiana; 33 Minnesota; 83 Missouri; 18 Nebraska; 40 New Jersey Equity; 100 New York; 92 North Carolina; 93 North Carolina; 12 Oregon; 21 South Carolina; 22 South Carolina; 19 Texas Court of Appeals; 64 Texas; 26 West Virginia; 63 Wisconsin. Albany: John D. Parsons, Jr., Publisher. 1886.

The volume before us brings this excellent series of reports nearly down to date, so far at least as concerns the States from which the cases are derived. There are no decisions rendered earlier than in 1883, some in 1884, but the most of them bear date of 1885. The volume is in arrangement, and, indeed, in all respects fully up to the standard of its predecessors. The *syllabi* of the cases are prepared with the care which their critical nature requires, and the notes which the reporter has appended to many of the cases are learned and judicious, and add much to the value of the book. We cannot do for it less, or more, than to commend it heartily to the favorable regards of the profession.

THE LAW OF NEGLIGENCE, by James H. Deering of the San Francisco Bar. San Francisco: Sumner, Whitney & Co., 1886.

This is another issue of the small volumes, practitioners or pony series, so much affected on the Pacific coast. It is a small volume, treating on a very large subject, the development of which, within living memory, is one of the marvels of the science of the law. The growth of the "Law of Negligence" reminds one of the classic poet's description of "Rumor" which, from small beginnings, swells until it pervades all space.

It is not because people of these days are more careless than their ancestors, but because they are held to a stricter account, that litigation of this character has increased to its present enormous proportions, that every day new liabilities are declared, new distinctions drawn, and new principles evolved by the ratiocination of the bench.

The author of the work before us has boldly tackled this great subject in this single volume of less than seven hundred pages (24mo.), and we must say with a success that we hardly expected when we first took up the work. There is no knowing, however, how much a man can say within a limited space, if he gives his mind to it, and while saying all he ought to say, says nothing that he ought not to say, and as little as possible of things that he need not say. With a rigid adherence to this rule, and a religious abstinence from padding, the sin that doth so easily beset the authors of legal works, a vast body of law can be gotten into an incredibly small space.

Mr. Deering seems to have appreciated fully all this, and his book is pretty fair evidence of its truth. It is concise, condensed, well arranged, and exhaustive. The work is divided into three parts, of which the first treats of the "General Principles of Negligence;" the second, of "Negligence in Particular Relations;" and the third of "Remedies for Negligence." There are forty-five chapters and four hundred and twenty-six sections, each with its appropriate heading, descriptive of its subject. The references in the index are by their numbers to the sections. All this is as it should be, but what we particularly like is the arrangement, peculiar we believe to the publishers of this book, of placing the notes to each section at the end of the section and not at the foot of the page.

Much thought, labor and research have manifestly been devoted to this work, and the modest and unpretentious little book, in which it is all embodied, is well worthy of a favorable reception by the profession.

JETSAM AND FLOTSAM.

GETTING ADMITTED.—A young man dropped into the office of a Dakota lawyer and said:

"What is a habeas corpus?"

"It is a kind of writ for——."

"That's all I want to know about it. Is a mandamus a writ, too?"

"Yes."

"Use pretty considerable of these writs in the law business I reckon?"

"Yes, there are a number of different kinds."

"What is the usual rate for making collections in the Territory?"

"We usually take about half."

"All right—thanks. You see I made up my mind this morning to become a lawyer and wanted to get a point or two. I'm going over to get admitted to the bar now before court adjourns—I'll hang out my shingle in the morning."

TART AND TESTY.—From the following item taken from the London *Law Times* it would appear that English judges have become singularly deficient in the *suaviter in modo*, which should especially characterize all gentlemen in high places.

The exhibition of temper by Mr. Justice Stephen, at Nottingham Assizes, is one of those incidents which everyone must deplore. Mr. Stevenson, a solicitor, appears to have had a dispute with the judge's clerk, as to a document which, being held by both, came in two. The conduct of the solicitor does not seem to have been very reprehensible, and, indeed, it went wholly unpunished. But, verbally lashed by the judge, he mildly said that the members of his branch of the profession had a good deal to bear, which is perfectly true. This expression precipitated the judge into a flood of personal abuse absolutely inexcusable, with the result that Mr. Stevenson must receive universal sympathy. Whether it is the distracting anxiety which Mr. Justice Hawkins says disturbs the judges, or the increased wear and tear of modern life, which is to be credited with the aggravated irritability which is to be found on the bench, we know not. But of this we are convinced that, if the judges are to retain the respect of the profession, they must not presume too much upon their position.

PEREMPTORY.—The *Times* says that on Wednesday Mr. Justice Field, after a jury had stopped a case in which the plaintiff claimed damages for personal injuries, expressing an opinion that the case ought never to have been brought, called the plaintiff's solicitor to the front of the court and, addressing him said: "Have the goodness, sir, at once to pay the jury their fees. I make an order to that effect, and if you do not pay these fees to-day, sir, I shall make an order for your attachment. I will not allow the jury to be treated like this; it is bad enough that they have to put up with their present low remuneration." [The statement is obviously imperfect; there must surely have been some demur on the part of the solicitor to the payment of the fees of the jury.] (*Solicitor's Journal* London.)